

Essay

“No relief but upon the terms of coming into the house”—Controlled Spaces, Invisible Disentitlements, and Homelessness in an Urban Shelter System

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The waiting area is a stark, oppressively stuffy room with dim lights and pale walls. A yellowed map of the United States hangs conspicuously in one corner, while the remaining walls are bare, except for the black and white flyers dot[ting] them, commanding “NO EATING IN THIS WAITING AREA.” The gray floor is strewn with broken crayons, pencils, and scraps of paper filled with child[ren’s] scrawl,

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The opening quotation, selected by Gertrude Himmelfarb from Jeremy Bentham’s *Pauper Management Improved*, exemplifies Bentham’s goal for the reform of the administration of poor relief: to channel all assistance through a network of centrally administered, physically segregated poorhouses. GERTRUDE HIMMELFARB, *THE IDEA OF POVERTY* 79 (1983) (citing JEREMY BENTHAM, *Outline of a Work Entitled Pauper Management Improved* (1798), reprinted in 8 *WORKS* 369, 383 (John Bowring ed., London, Simpkin, Marshall & Co. 1843)).

perhaps representative of their own innocent frustration in the waiting. There is no clock on the wall—a fitting omission in a room where time stands still. . . . By 2:00 p.m. children who have been at OESSS since 8:00 a.m. are either crying from hunger or falling asleep. Women cannot feed their children in the building, nor can they leave to get food for fear that they will be called for their intake interview and miss it. One woman fed her children sandwiches in the bathroom so they would not starve while waiting to be called.¹

I. INTRODUCTION

From roughly September of 1991 through May of 1992, a group of community activists and law students spent time in the waiting room of the District of Columbia's Office of Emergency Shelter and Support Services (OESSS).² They had two goals: to provide basic information and assistance to homeless families applying for overnight shelter, and to note how those families were being treated in the application process, which, up to that point, remained unobserved and undocumented.³

This perspective on applicants' experiences revealed a waiting room ethos of undisclosed information, unexplained delays, and, above all, endless waiting, punctuated by humiliating demands for information. Sometimes the applicants' search ended in the waiting room before it had truly begun—not because the applicants failed to qualify for public assistance benefits, but because they never got the chance to ask for them. Discouraged by the demands of the

1. Kira Finkler & Patricia Kennedy, *Monitoring OESSS and the Intake Process* 16 (Jan. 8, 1992) (on file with author) (OESSS Monitoring Project).

2. The Office of Emergency Shelter and Support Services (OESSS) administered the publicly funded overnight shelter system for the District of Columbia from 1984 through 1994. *See generally* D.C. Dep't of Human Servs., Organization Order No. 156 (Nov. 3, 1987) (citing D.C. DHS Organization Order No. 116 (establishing OESSS as administrator of shelter services)); Memorandum of Understanding Between the District of Columbia, United States Department of Housing and Urban Development, and the Community Partnership for the Prevention of Homelessness 13 (May 16, 1994) (on file with author) (stating intent to transfer responsibility and funds for provision of all shelter services from OESSS to Community Partnership, a private, not-for-profit service organization).

3. During the course of the waiting room monitoring project students reported contacts of varying lengths and intensities with 54 families, 47 of which were applying for shelter and seven of which had been expelled from it. In 10 instances, the contact involved actual representation of families through referral from the Washington Legal Clinic for the Homeless, a private public-interest law firm specializing in advocacy on behalf of homeless people. Of the other 44 families that students met for the first time in the waiting room, four requested assistance in filling out applications for shelter and during the intake interview. The interviews with the remaining 40 families were short and informational.

The waiting room project came to an abrupt conclusion in May of 1992, when the last of three altercations between advocates and administrators—the handcuffing of an attorney in full view of the applicants whom he was attempting to advise—led administrators to close the waiting room to outsiders. *See Brooke A. Masters, Homeless Advocate Alleges Arrest Threat at D.C. Office*, WASH. POST, May 14, 1992, at B12. The closure of the waiting room spurred litigation by advocates for the homeless. *Washington Legal Clinic for the Homeless v. Kelly*, No. 92-1894 (D.D.C. dismissed without prejudice Oct. 30, 1992). For a full description of the context of the Washington Legal Clinic for the Homeless litigation and its history, see Frank R. Trinity, *Shutting the Shelter Doors: Homeless Families in the Nation's Capital*, 23 STETSON L. REV. 401 (1994).

application process itself, impoverished would-be applicants dropped out before they could be officially denied or counted—or even noticed.

The disjunction between a system of emergency relief, designed on paper to meet desperate need as expeditiously as possible, and the treatment that applicants actually received, inspired this investigation into the range and historical context of preapplication discouragement practices. This Essay outlines the ways in which access to social services is frustrated in informal settings, such as the waiting room at OESSS, and explores the genesis of such practices.

Litigators use the term “discouragement” to refer to informal practices that deter poor people from applying for public benefits.⁴ These tactics form a virulent subcategory of the informal “bureaucratic disentanglement” processes used by public assistance offices to withhold benefits from arguably eligible recipients.⁵ Bureaucratic disentanglement can be achieved through any practice that frustrates attempts to apply for benefits, or that delays actual receipt of the benefits once the applicant’s eligibility is officially confirmed. The term discouragement refers specifically to those practices implemented by public assistance offices that make the process of applying for benefits so wearisome and unpleasant that the applicant simply gives up and goes away.

Discouragement practices can take many forms. The most frequently noted method of discouragement is “verification extremism”: the unnecessary demand for hard-to-obtain proof of eligibility for the benefits as a prerequisite to filing an application.⁶ Other means of discouraging applications for benefits include misinforming or withholding information—about benefits generally, the applicant’s eligibility for a particular benefit, or the status of her application for that benefit—and demanding the physical presence of the would-be applicant during every step of the process.

Most of these practices are invented and implemented by front-line welfare workers. Since preapplication procedure is informal and largely unregulated, line workers are forced to improvise. Welfare workers interpret articulated pressures from above—for example, to increase efficiency and reduce error rates—through their own conflicts about the poor and through the unarticulated messages they receive from the bureaucratic culture of disentanglement. Informal discouragement practices, implemented before formal eligibility criteria take precedence, strongly reflect workers’ personal conceptions of the causes of

4. For a reference to “discouragement” in the context of an 18-year litigation to end a number of such practices, see Consent Order, *Alexander v. Flaherty*, No. C-C-74-183-M (W.D.N.C. Mar. 20, 1992).

5. Michael Lipsky, *Bureaucratic Disentanglement in Social Welfare Programs*, 58 SOC. SERV. REV. 3 (1984); see also Gary L. Blasi, *Litigation Strategies for Addressing Bureaucratic Disentanglement*, 16 N.Y.U. REV. L. & SOC. CHANGE 591 (1987–88) (applying Lipsky’s theory to persistent thwarting of homeless applicants’ attempts to apply for general assistance).

6. Timothy J. Casey & Mary R. Mannix, *Quality Control in Public Assistance: Victimized the Poor Through One-Sided Accountability*, 22 CLEARINGHOUSE REV. 1381 (1989) (referring to excessive bureaucratic demands for documentation of eligibility as “verification extremism”).

poverty and its proper cures. These beliefs reflect ancient debates about the extent of communal obligations to the poor.

Not all manifestations of discouragement are the result of decisions by individual line workers. Many are the consequence of higher-level government decisions about relief policy. For example, the enforced sequestration of would-be applicants in one isolated physical space, a common feature of many public assistance systems, is the result of a government decision about where to locate an intake center. The sheer inconvenience of traveling to and from an isolated intake center can clearly discourage would-be applicants from seeking benefits, or from persisting in their quest for these benefits. Other seemingly neutral and system-based forms of discouragement stem from the administrative inability of social services staffs to cope with increased demand. Long lines, interminable waits, and sometimes closed doors, when offices must shut down intake to deal with their backlogs, all exhaust applicants; often they deflect them absolutely. This Essay explores the facial "neutrality" of such practices, and suggests that they are neither so neutral, nor so separate from the actions of individual workers, as they appear at first glance.

Paradoxically, the very constitutional principles and statutory and regulatory safeguards designed to protect the rights of individuals and to safeguard the administrative integrity of welfare programs may provide perverse incentives to cut individuals off before the application process has begun. Due process protects access to benefits as a "matter of statutory entitlement for persons qualified to receive them."⁷ "Qualified to receive" is the "trigger";⁸ entitlement status depends on the behavior of those in a position to determine eligibility.

Federal and local benefits statutes and regulations grant *applicants* enforceable guarantees of procedural openness, promptness, and certainty in the evaluation of their qualifications. But only officially designated "applicants"—that is, the people who actually get to fill out an application—can invoke these norms. The whole point of bureaucratic disentanglement is to keep the key event of filing an application, with all the administrative and legal scrutiny it can precipitate, from happening. This Essay will discuss why would-be applicants, more than any other actors in the benefits system, need the protection of an encompassing "dignitary" due

7. *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970).

8. See Jerry L. Mashaw, *Dignitary Process: A Political Psychology of Liberal Democratic Citizenship*, 39 U. FLA. L. REV. 433, 439 (1987) (discussing problems with relying on "positive law triggers" to signal when entitlements exist and due process protections attach). For an earlier discussion of the shortcomings inherent in thinking of due process solely in terms of "entitlement triggers," see Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process*, in *DUE PROCESS: NOMOS XVIII*, at 126, 132 (J. Roland Pennock & John W. Chapman eds., 1977).

process now more than ever.⁹ Without such a safeguard, applicants are no better than supplicants.

II. FACES OF DISCOURAGEMENT

A. *Two Faces of Preapplication Discouragement: Tanya and Shauna*

The informality of preapplication discouragement practices makes them difficult to categorize. They take shape in countless variations and recombinations. But several recurrent "faces of discouragement," observable across a wide range of welfare interactions, can be isolated. Most discouragement practices that we observed at OESSS fall within four basic categories: the demand for the applicant's physical presence as a precondition to application, the physical isolation of the applicant in the waiting room, the withholding of information from the applicant, and verification extremism.

These preapplication discouragement processes and their effects are best understood through the experiences of would-be applicants. The following stories, drawn from the waiting room of the OESSS, begin to define the meaning of discouragement.

1. *Tanya*

Tanya was nineteen years old. She had two infant daughters with whom she was living temporarily in a shelter for adults. The shelter could no longer accommodate the three as a family. Tanya exhausted the rest of her limited housing resources—friends, family—and then tried OESSS. She visited OESSS twice. The first time the intake supervisor refused to give her an application because, although she brought her children, she failed to bring their social security cards or birth certificates. In connection with her application for federal Aid to Families with Dependent Children (AFDC), Tanya already had sent requests to the Maryland Department of Vital Statistics for copies of the birth records, but had not received them yet.¹⁰

After her first unsuccessful attempt at applying for shelter, Tanya called the Washington Legal Clinic for the Homeless (WLCH),¹¹ and was referred

9. See, e.g., Cynthia R. Farina, *Conceiving Due Process*, 3 YALE J.L. & FEMINISM 189, 214 (1991) (describing "intuitive appeal of a dignitary conception of due process"); Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 899-906 (1981) (constructing a "taxonomy of dignitary values").

10. Susan Bennett, Tanya D. File, Intake Memo 1 (Oct. 15, 1991) (on file with author) (OESSS Monitoring Project). "Tanya" is a pseudonym, as are all the names of shelter applicants used in this Essay. I have eliminated some otherwise irrelevant and possibly identifying biographical information.

11. It is unclear how Tanya even knew to call WLCH. OESSS does distribute a form to rejected applicants detailing their right to either an informal "administrative review" or a more formal fair hearing. But since Tanya was not even permitted to apply, and never received a written denial, she never received this form.

to two law student advocates. At her request, they called the supervisor that afternoon, to emphasize Tanya's need for shelter and to explain that she had already requested and paid for her children's birth certificates but had not yet received them. He told the students to send her to OESSS, where she would be placed if there was room. Hoping to obviate the need for Tanya to make another useless trip, the students called the supervisor an hour later. They assured him that Tanya would arrive and asked him to hold a space for her. He refused to do so.

For the second time that day, Tanya traveled to the waiting room to apply for shelter. Once again, her two children were with her; this time, they were feverish and coughing. After she arrived, the intake supervisor told her that there was no space left, and refused to give her an application. She and her daughters departed into a rainy October afternoon. At 10:00 p.m., she called an ambulance to bring the children to Children's Hospital, where the children were diagnosed as having ear infections and bronchitis. Despite its unsuitability as a shelter for children, the adults' shelter where Tanya had been staying took the family back in for the night.

Tanya and her children returned to OESSS at noon the next day, this time in the company of the two law students. The students called ahead to leave a message for the intake supervisor. They wanted to alert him to their planned arrival, and to the fact that, since the two children were now ill, the family's situation was deteriorating. They arrived at noon. At 3:00 p.m., the supervisor returned to the office from an unexplained absence. He instructed the students that office policy prohibited homeless families from applying for shelter until they amassed the required documentation. When the students referred to the regulation that provides for shelter pending completion of documentation,¹² he stated that the office did not interpret the regulation that way.¹³ He then left the room. Tanya and the students remained at the office because Tanya had nowhere else to go.

At 5:15 p.m., an intake worker called Tanya, her children, and the students into his office. He told Tanya that he would give her seven days of shelter, but no more, unless she provided proof that the children were her own, and of the family's status as homeless. He punched up Tanya's AFDC file on his computer and proceeded to call the various family members listed. The calls were meant to corroborate informally that the children were in fact Tanya's, and to make sure that Tanya and her children could not stay with any members of the family. Throughout the conversations, the worker uttered a barrage of disparaging comments about Tanya, some under his breath, but many audible.

12. The regulation stated that "[l]ack of available documentation shall not be a ground for denial of services on the night of application." 39 D.C. Reg. 470 (1992).

13. See Marguerite Angelari & Mandy Rosenblum, Summary of T.'s Case (n.d.) (on file with author) (OESSS Monitoring Project).

At 6:00 p.m., the worker finished his phone calls. On their third visit to OESSS in two days, and after six hours of waiting, Tanya and her children were placed at the Family Living Center.¹⁴

2. *Shauna*

Shauna is a single mother of three children. Two of these children—a son and a daughter, both of school age—lived with her. Shauna and her children had been staying with an older friend of the family in horrific living conditions. The older woman stayed in the apartment's only bedroom, leaving Shauna to share a bed with her two children. The older woman was confined to a wheelchair and could not use the bathroom in the apartment. Instead, she used old soup and vegetable cans to dispose of her waste, which she left at the foot of her wheel chair or by her bed on the floor. Shauna expressed deep concern for the safety and health of her children.

Shauna had her children with her in the waiting room. This was the second day they missed school while waiting to see someone at OESSS.

Shauna had come to OESSS the day before, at 8:00 a.m. She waited until 6:00 p.m. and was finally told to return the next day with the "proper documentation," i.e., a notarized letter from the elderly woman in the wheelchair stating Shauna and her children could not live there anymore. Shauna returned the next day with a letter that was not notarized because the elderly woman could not leave the apartment. When Shauna first turned the letter over to OESSS, one intake worker told her that it would be sufficient. A few hours later, when she went back to inquire when she would be helped, she was told that other people from the previous day were before her. The workers did not give her credit for her visit the day before. Eventually, she was told that the letter would not be sufficient because it was not notarized. In all, intake workers told Shauna three different stories before finally placing her at 5:15 p.m.; even then, they would not tell her where they were placing her. They would not tell any of the women where they were being placed.¹⁵ Because she waited for two days at OESSS, Shauna was unable to get her food stamps for the month.

The vignettes from the waiting room at OESSS illustrate, in microcosm, just a few of the many operations of discouragement. These homeless mothers and their children were subjected to hours of confinement; workers withheld their applications, information about their status as applicants, and information about the availability of shelter. The families also endured excessive, contradictory, and illegal demands for documentation of their eligibility—and

14. *Id.* at 1; Marguerite Angelari & Mandy Rosenblum, Opening Memo (Oct. 15, 1991) (on file with author) (OESSS Monitoring Project).

15. Finkler & Kennedy, *supra* note 1, at 4–5.

sometimes all of the above in one day, only to have a similar encounter the next day, and the next. These experiences exemplify similar discouragement practices that pervade the application processes for other public assistance systems.

B. Faces of Discouragement: Verification Extremism

"Verification extremism" lay at the heart of every injury done to the homeless families at OESSS; it is the main cause of preapplication disenfranchisement in benefits systems everywhere.¹⁶ Fixations on the form of proof of eligibility—on a particular type of document, or on a particular form of certification of a document—can be impassable logistical obstacles that bear little relationship to ensuring the integrity of the program. In turn, the demand that applicants submit extralegal forms of documentation up front, as an absolute condition precedent to the filing of an application, can effectively stop the process for the applicant.

Unclear, sometimes contradictory demands for preapplication documentation also force applicants to make repeated visits to the intake center. In fact, the most striking aspect of the application experiences of the forty-seven families we interviewed in the waiting room was that over half of them had been there before. Only fifteen of the forty-seven had received some definitive determination of their eligibility for shelter on their first visit. Of the remaining families, twenty-two had sought shelter unsuccessfully at OESSS before. Only three of these ever had been rejected as being ineligible; another ten were told that no shelter was available. Everyone else was sent away because of allegedly insufficient verification. As was the case with Tanya and Shauna, many of these multiple visits occurred without the family ever being allowed to file an application for shelter.

The experiences of Tanya and Shauna showed that intake workers at OESSS imposed three verification requirements with particular fervor: Applicants had to produce their children in person, submit their children's birth certificates, and verify their claims of homelessness with notarized statements. Failure to satisfy any one of these criteria could derail an application for shelter. These demands for redundant extralegal proof often forced applicants to produce documentation to verify the concrete and visible. As we have seen, Tanya's inability to produce birth certificates delayed her application by a day—even though her children were physically present in her arms. Other

16. Extensive verification of eligibility also places a large administrative burden on welfare offices. This has the effect of slowing the distribution of benefits to qualified recipients who have completed the application process. See *infra* part III.B.

mothers also lost precious time because the physical presence of their children was inadequate to prove that the children were really theirs.¹⁷

The intake workers' emphasis on production of particularized forms of proof before any application processing could begin was not surprising. Although the experiences of Tanya and Shauna were anecdotal, their experiences represented a faithful execution of internal policy. During our times in the waiting room, we noticed that at some random point during a family's visit, intake workers would give the head of the family a piece of paper that read:

ALL APPLICANTS FOR FAMILY SHELTER

BEFORE APPLYING FOR SHELTER—

ALL APPLICANTS WILL NEED THE FOLLOWING:

- * Notarized Statement
Referral
Eviction Notice
Writ
- * Statement of Income (i.e., SSI Income, AFDC Eligibility)
W-2
Statement of Earnings/Pay Stub
- * Birth Certificates (*adults and children*)
- * Social Security Cards (*adults and children*)
- * Picture ID
- * *All children must be present at the time of intake*

OESSS Shelter Intake Unit
June 1991

Every applicant received this "notice" at some point in her visit to the waiting room. Its requirement that applicants provide immediate proof of homelessness was probably responsible for forcing many families to leave without filing applications, and may have been responsible for some families' failure to return.

The question is whether the OESSS notice, which waiting room practice so accurately reflected, comported with the actual local law governing application for overnight shelter. "Homeless" for purposes of qualifying for public overnight shelter in the District is defined by whether the applicant has

17. See, e.g., Holly Baer, *Untitled Memorandum 3* (Mar. 11, 1992) (on file with author) (OESSS Monitoring Project) (relating experiences of mother initially refused application because she did not have birth certificates or Social Security cards for her three children). This is consistent with past practice; intake workers have insisted on the production of birth certificates to show that the children have not been borrowed to enable applicants to qualify for family shelter. See *Deposition of Cornelle Chappelle* at 93, *Russell v. Barry*, No. 87-2072 (D.D.C. Aug. 25, 1987).

financial, familial, or social resources available to secure shelter on her own.¹⁸ Commensurate with the degree of the need, the overnight shelter program requires immediate attention to the eligible client: Homeless clients must receive service on the day of application, even if they cannot fully document their homelessness.¹⁹ The agency must shelter the homeless individuals or families that night upon any showing of homelessness, and must allow them to turn in their proof as much as seven days later.²⁰ Documentation of eligibility is limited to what "is reasonably available to the applicant."²¹ In short, the flexibility in meeting the requirements for proof of eligibility reflects that shown in other programs, such as AFDC²² and the food stamp program.²³

How did OESSS interpret these explicit local directives for a swift and straightforward application process? A glance back to the notice to "All Applicants for Family Shelter" reveals a scheme in which every requirement either balanced on the edge of the impermissible or, in several respects, fell over it. OESSS' internal policy exceeded the requirements of the law both in terms of the form of proof of eligibility required and the timing of the presentation of this proof. The District's regulations allow a request for Social Security numbers;²⁴ the notice required submission of Social Security cards. The regulations provide for "[s]tatements describing the reasons for the applicant's need for shelter,"²⁵ including information on catastrophes such as

18. D.C. CODE ANN. § 3-603(5)(A) (1981) (giving primary definition of homeless person or family as lacking both means to acquire and any "present possessory interest" in housing accommodation); D.C. Mun. Regs. tit. 29, § 2502.3(a)-(c) (1992) (defining financial ability to acquire interest in housing as owning financial resources of more than \$100, a credit card, or net income within preceding 30 days that exceeds limit for qualification for emergency assistance program).

19. D.C. Mun. Regs. tit. 29, § 2503.6 states: "If the Department cannot verify the applicant's eligibility for temporary family housing . . . on the day requested, the Department shall temporarily place the applicant or make a referral to available shelter for that night." The indirect nature of the regulation is worth noting: While the intent to shelter eligible applicants on the night of application is clear, it is couched in terms of relaxing official requirements for documentation.

20. *Id.* § 2503.2 ("Lack of available documentation shall not be a ground for denial of services on the night of application."). The regulations allow OESSS to terminate shelter services seven days after initially placing the family if "the Department has been unable to verify eligibility because of the applicant's failure to cooperate and assist in verifying eligibility." *Id.* § 2510.6.

21. *Id.* § 2503.1; *see also id.* § 2503.10 (a)-(g) (enumerating discretionary items of information that Department may require applicant to provide).

22. *See* 45 C.F.R. § 206.10(a)(1)(ii) (1993) (instructing that applicants must file written applications, signed under penalty of perjury); *id.* § 206.10(a)(2)(i) (stating that offices must inform applicants about eligibility requirements); *id.* § 206.10(a)(10) (asserting that methods for determining eligibility must be "consistent with the objectives of the programs" and not violate applicants' civil rights); *see also id.* § 233.10(a)(1)(iv) ("Eligibility conditions must be applied on a consistent and equitable basis throughout the State.").

23. *See* 7 C.F.R. § 273.2(i)(4)(i)(A) (1994) (indicating that corroboration of identity is the only absolutely necessary proof for expedited issuance of food stamps); *id.* § 273.2(f)(1)(vii) (enumerating several options for proof of identity, such as driver's license, birth certificate, or school ID, with emphasis on nonexclusivity of list of options); *id.* § 273.2(i)(4)(i)(B) (obligating state agency to issue expedited stamps or Authorization to Purchase (ATP) card within five days even if it has not finished collecting corroboration of applicant's income or resources).

24. D.C. Mun. Regs. tit. 29, § 2503.10(c).

25. *Id.* § 2503.10(g).

eviction;²⁶ the notice demanded *notarized* statements. Nothing in the regulations mentions the production of birth certificates or of picture IDs;²⁷ the notice required both. Nothing in local or federal regulations could be remotely construed as requiring the physical presence of the applicant's children; the notice insisted upon the attendance of "*all*" of them. Finally, especially in light of the federal and local mandate for immediacy of service, nothing could be clearer than the illegality of imposing these requirements "BEFORE APPLYING FOR SHELTER."²⁸

The monitors' experiences on November 12, 1991, illustrated how faithfully intake personnel enforced the dictates of the notice to applicants. Of eight women interviewed by students on that day, six were making a return attempt to apply for shelter because they had failed to produce the requisite documentation the preceding week.²⁹ Most frequently, the applicants faced variations of demand for the critical criteria of birth certificates, physical presence, and notarization. Of these, notarization of virtually any and all documents often became the final formality for an application at OESSS. Although a notarization requirement seems small on paper, it could be a significant barrier for the homeless applicants at OESSS; a few dollars to pay a bank, the fare for the bus or subway to get to one, and the prospect of keeping several small children in tow throughout the process, were daunting obstacles to most applicants.

A review of the experiences of several OESSS applicants shows how powerfully OESSS practice reflected an institutional faith in the power of notarization to confirm truthfulness. Jane and Sandra were two of the November 12 returnees. After living illegally for two years in her handicapped sister's subsidized apartment, Jane and her three-year-old moved to her mother's house. Even with her sister's notarized statement in hand, swearing that she could not return to the apartment, Jane was denied because she lacked a notarized statement from her mother. Her mother was present with her at OESSS at the time—and, presumably, available to attest to her daughter's homelessness in person. Similarly, Sandra had to return to OESSS on November 12 because, at her previous visit, OESSS personnel had demanded her girlfriend's notarized statement to confirm her homelessness, which Sandra could not afford to secure. That Sandra could produce her girlfriend

26. *Id.* § 2503.10(g)(1).

27. *See id.* § 2503.10(a)-(g).

28. Reviewers of the District's shelter system have recognized the harm inflicted by OESSS' verification practices, and have recommended reforms. *See* MAYOR'S ADVISORY TASK FORCE ON HOMELESSNESS REPORT 20 (1992) (stating recommendation of mayoral commission composed of shelter providers, administrators, and advocates that District find families presumptively eligible for immediate shelter without requiring "birth certificates, an eviction notice, or other proof" and that OESSS equip intake workers with program manuals to instruct them on regulations).

29. Amy Jelaso & Stefan Kline, Statement of Intake Experience (Nov. 13, 1991) (on file with author) (OESSS Monitoring Project).

in person to confirm her homelessness was worthless.³⁰

The unpredictability with which staff imposed verification requirements exacerbated the onerousness of the requirements. Examples show that staff applied requirements inconsistently or not at all—often over a short span of days. When Sandra returned to OESSS, again accompanied by her friend, an intake worker still insisted on a signed statement, but accepted it without notarization.³¹ Lucy had no receipt from the hotel where she had stayed the night before. Intake workers told her that a receipt was necessary. Still, when she came back later on November 12, again without the receipt, she was placed.³² Louisa brought her two teenage sons with her to OESSS on January 2, 1992. They were sent away with instructions to return with a notarized statement from their landlord certifying that they were being evicted. Intake workers told Louisa that she would have to bring her children with her when she returned. When all three arrived for the second time at OESSS, on January 7, they were told that the children's attendance was unnecessary.³³

Verification excesses of the sort practiced by OESSS are most egregious when they appear in emergency benefits programs. The excesses stand out because the delays that verification extremism induces occur in the face of urgent need. The regulations under which all emergency benefits programs operate demonstrate their recognition of that urgency by specifically exempting applicants from immediately proving the validity of their need. For instance, the expedited food stamp program requires a decision fast enough to put Authorization To Purchase (ATP) cards or food stamps in the hands of qualified recipients within five calendar days of the date of application.³⁴ Thus, although every applicant may not qualify for expedited service, every applicant must be screened instantly for it under relaxed eligibility standards.³⁵

Nonetheless, examples abound, including numerous ones from the District of Columbia, of time wasting and unnecessary demands for complete

30. *Id.*

31. *Id.*

32. *Id.*

33. Finkler & Kennedy, *supra* note 1, at 2. Similarly, students described the situation of Lila, who waited until 5:00 p.m. on a Friday with her 10-year-old son to find out that they had been placed temporarily in an adults' shelter, but would have to return to OESSS the following Tuesday to reapply for family shelter. After some prodding, the intake worker agreed to allow Lila to reapply without bringing her son with her. Alec Deull & Diann Hammer, *Our 2/7/92 Visit to OESSS Intake 3* (Feb. 8, 1992) (on file with author) (OESSS Monitoring Project).

34. See 7 C.F.R. § 273.2(i)(3)(i) (1994). Recognizing that mail delivery sometimes works too slowly to help desperately destitute applicants qualify for expedited food stamps, one court invalidated the federal regulation allowing welfare offices to comply with the five-day rule by mailing ATP cards within five days of application. *Harley v. Lyng*, 653 F. Supp. 266, 277 (E.D. Pa. 1986).

35. Compare 7 C.F.R. § 273.2(i)(4)(i)(A)–(B) (stating that in screening for eligibility for expedited service, benefits office may require immediate verification only of identity, income, and resources, by collateral contacts or documentation) with *id.* § 273.2(e)(1)–(2) (requiring face-to-face interviews in regular service verification procedures, waivable for elderly or disabled applicants or applicants living at distance from agency office) and *id.* § 273.2(f)(4) (instructing that for regular service, documentary verification is required of eligibility factors such as income and household size).

verification of eligibility.³⁶ For example, in *Franklin v. Kelly*, D.C. applicants for expedited food stamps were subjected to full-fledged eligibility interviews, and some had to wait for hours before being interviewed.³⁷ Although no one form of documentation of identity is required for applicants to either the expedited or the extended service program, some centers accepted only forms of identification with photographs,³⁸ and even required applicants for expedited service to have photo IDs made.³⁹ The Food and Nutrition Service specifically waives such requirements if they delay issuance of stamps.⁴⁰ Still, the line workers described in *Franklin* continued to require such proof, despite the fact that the requirement delayed issuance of benefits.⁴¹

In addition, for many applicants, multiple inconsistent requests for verifying information forced multiple visits to the food stamp center, and corresponding delays in the processing of applications. To meet demands even more excessive than those made at OESSS, one applicant for food stamps had to return to her center with different documents seven times.⁴²

The inconvenience and delay that applicants face may be caused by administrative misdirection or negligence. But when the resulting burdens are viewed against the backdrop of applicants' desperation, it is difficult to accept that those who make mistakes mean no harm. Nine months pregnant and accompanied by her eleven-month- and nine-year-old sons, Susanne had been denied the chance to apply for shelter twice at OESSS during the preceding week for lack of proof of homelessness. A worker sent Susanne to her D.C. Department of Human Services (DHS) caseworker and then to the Randall School (formerly an OESSS administrative office but at that time a shelter for homeless men) to obtain documentation. Personnel at both places had no idea why she was there. When Susanne returned, she was denied again because the

36. Order, *Franklin v. Kelly*, Civ. Action No. 90-3124 (D.D.C. Sept. 24, 1992) (approving settlement agreement, dismissing without prejudice, and continuing court's jurisdiction over settlement agreement filed June 13, 1991); Class Action Complaint for Declaratory and Injunctive Relief at 16-17, *Franklin*, Civ. Action No. 90-3124 (D.D.C. filed Dec. 26, 1990) (alleging failures on part of administrators of food stamp program to advise applicants of rights to expedited food stamps, to screen them for eligibility, and to accept completed applications for expedited stamps without interview, and alleging "conduct that discourages" eligible persons from applying).

37. Report and Recommendations of the Special Master at 23, *Franklin*, Civ. Action No. 90-3124 (D.D.C. Nov. 19, 1992) [hereinafter *Franklin* Special Master's Report].

38. *Id.* at 41.

39. *Id.* at 26.

40. *Id.*

41. Securing the ID involved two extra steps after picking up the ATP card at the central office: taking the ATP card to the local office to receive a "photo ID referral form" and returning to the central office with the card and the form to retrieve a photo ID. *Id.* Similar examples of delay in issuance of benefits due to overzealousness in verification of eligibility can be found in other expedited food stamp programs. See, e.g., *Southside Welfare Rights Org. v. Stangler*, No. 90-4271-CV-66BA, slip op. at 2 (W.D. Mo. Jan. 25, 1993) (summarizing plaintiffs' original statement of claims, including allegations that delays in processing of expedited food stamp applications resulted from defendants' demands for verification of eligibility criteria other than identity, and for documentation of identity beyond that securable through collateral contacts).

42. See *Franklin* Special Master's Report, *supra* note 37, at 46-47.

worker trainee's supervisor was not present to approve shelter. The trainee told her, "Don't get worked up; I don't want you to go into labor here." This left the family with no place to go; they were forced to spend a long holiday weekend in a crack house.⁴³

Other requests seem to push any logic of verification to extremes, in the nature, frequency, and duplication of proof to be exacted. William Simon gives the example of the immigrant mother who submitted twelve letters within six months to verify her children's school attendance, only to lose her family's grant when the summer closing of the school office rendered her incapable of producing the thirteenth.⁴⁴ During the monitoring project we met Wendy, who left her apartment with her daughter to avoid her landlord's sexual harassment. Her intake worker asked her to provide a written statement from her landlord attesting to the truth of her allegations.⁴⁵ Other applicants for assistance have confirmed similar requests for corroboration of information that, because of the nature of the source, is virtually impossible or humiliating to procure.⁴⁶

"Verification extremism" hurts all applicants for public benefits; notarization requirements and multiple appointments are features of all public benefits systems.⁴⁷ But the administrative imposition of financial hardship and geographical dislocation affects homeless persons most severely, for they have no home base from which to collect documentation, set out on errands, and receive mail. While federal legislation has eliminated the previously widespread regulatory requirement that applicants submit proof of conventional residence in order to be eligible for public benefits,⁴⁸ nothing has addressed

43. Jelaso & Kline, *supra* note 29.

44. William H. Simon, *Legality, Bureaucracy and Class in the Welfare System*, 92 YALE L.J. 1198, 1198-99 (1983).

45. Finkler & Kennedy, *supra* note 1, at 5-15.

46. THERESA FUNICIELLO, *TYRANNY OF KINDNESS* 28 (1993).

47. See, e.g., Roldan v. Minter, 409 F. Supp. 663, 664-65 (D. Mass. 1976) (discussing two AFDC applicants who could not meet state's internal verification requirement of written documentation of ages and relationship of children because applicant from Puerto Rico had left behind all documentation, and applicant who was a Gypsy did not, by custom of her culture, keep written records); see also Complaint at 8-9, *Lewis v. Johnston*, CA3-87-1764-R (N.D. Tex. filed July 17, 1987) (alleging plaintiff with custody of sister-in-law's children was denied emergency assistance under AFDC program because she could not provide her husband's and sister-in-law's birth certificates, even though these documents were irrelevant to custodial relationship with children); Consent Decree at 3, *Lewis*, CA3-87-1764-R (N.D. Tex. Feb. 21, 1989) ("The problems of families eligible for AFDC losing needed assistance due to alleged burdensome State verification requirements are a problem [sic] of continual concern."); Sherry Leiwant & John Hasen, *Caselaw on AFDC Verification Problems*, 21 CLEARINGHOUSE REV. 215 (1987).

48. To see the changed requirement for surveying propriety of and limitations on verification requirements for food stamps, see the Homeless Eligibility Clarification Act, Pub. L. No. 99-570, § 11002(b), 100 Stat. 3207-167 (1986) (codified at 7 U.S.C. § 2012(i) (1988)), and 7 C.F.R. § 273.3 (1994); for veterans' benefits, see 38 U.S.C. § 5103(c) (1988 & Supp. III 1991), and 38 C.F.R. § 1.710 (1994); for Supplemental Security Income benefits, see 42 U.S.C. § 1383(e)(3) (1988), and 20 C.F.R. § 416 (1994); and for Medicaid, see 42 U.S.C. § 1396a(a)(48). For a chronicle and analysis by one of the architects of the national campaign to develop a legislative strategy to address homelessness, of which the Homeless Eligibility Clarification Act marked the first stage, see Maria Foscarinis, *Beyond Homelessness: Ethics, Advocacy, and Strategy*, 12 ST. LOUIS U. PUB. L. REV. 37 (1993).

the problem that applicants and recipients virtually need a home office—let alone a home—to maintain the records demanded for verification of eligibility.

C. *Faces of Discouragement: The Demand for Presence*

The demand that applicants be physically present to produce their documentation exacerbated the other impediments to assistance that homeless families encountered at OESSS. Without such a requirement, applicants would not have had to suffer the endless waiting, and might have had the opportunity to avoid repetitive interviews with intake workers. The demand for physical presence can be understood as an aspect of verification extremism: intake workers were not satisfied by documentation; they wanted living proof.

The demand that children be present as proof of *their* existence constituted a sort of physical presence “plus.” It frequently forced truancy of older children from school.⁴⁹ In fact, the requirement produced intense discomfort for children of all ages, who could not be fed in the waiting room and could not leave it for fear of losing their family’s place in line. For Shauna, the solution was withdrawing her children from school; for Tanya, pulling sick children through the rain. For them, as for the many other women we interviewed, the only option was to sacrifice their children’s immediate and future well-being to the imperative that they all apply in person.

In this and all other benefit programs, the demand for presence represents even more than a heightened form of verification extremism. It is, in fact, a demand for forced association. Either the applicant must “come into the house” of the welfare system to prove her eligibility for the benefit, or an emissary from the house will come to visit her. Home visits to ascertain true need are an old feature of private charity.⁵⁰ Their modern use to verify eligibility is officially prescribed in federal welfare practice as a means of quality control.⁵¹ At the state level, home visitation takes place in the form of

49. See *supra* p. 2163. The requirement that applicants physically produce their children also forced applicants to violate the truancy statute, D.C. CODE ANN. §§ 31-402(a)-(d), 31-403(c) (1993) (establishing parents’ failure to keep their children between the ages of five and 18 in school as misdemeanor), and to compromise their eligibility for the very shelter they were trying to secure, D.C. CODE ANN. § 3-605(b)(3) (1994) (allowing Department of Human Services to deny or terminate overnight shelter to anyone who “has not [enrolled] or will not enroll” her children in school); D.C. Mun. Regs. tit. 29, § 2506.12(a) (1992) (requiring parents to keep children in school as condition of eligibility for temporary family housing).

50. For a discussion of the practice of “friendly visiting” as a mainstay of 19th-century personalized philanthropy, see *infra* part III.A.1.

51. See 45 C.F.R. § 205.42(c)(2) (1993). The current federal Quality Control Manual requires reviewers of cases drawn from the designated “review month” to schedule a home interview in every sample case. DIVISION OF QUALITY CONTROL, OFFICE OF FAMILY ASSISTANCE, AFDC QUALITY CONTROL MANUAL at I-12 to -13 (1992) [hereinafter 1992 QUALITY CONTROL MANUAL]. While the Manual informs the reviewer that the recipient’s legal right to refuse entry is absolute, it also instructs the reviewer to remind the recipient that the local agency will be informed of the recipient’s failure to cooperate and may terminate payments as a result. *Id.* at I-18. Federal regulations require states to get the permission of families or individuals before requesting information from a third party about the family. 45 C.F.R. § 205.50(a)(2)(iii). But the federal quality control reviewer planning to contact a collateral source for

investigators' unannounced and nonconsensual visits to the homes of applicants and recipients.⁵² Grouped with the remaining forms of discouragement that we will examine—the manipulation of information and the physical isolation of the application process—the demand for presence not only inconveniences would-be applicants, but imprisons them.

D. *Faces of Discouragement: Misinformation and the Withholding of Information*

The shelter system withheld virtually all information from applicants about any aspect of the shelter application process—not only about whether they would be found eligible, but even about the families' chances of being sheltered that night. The tension from knowing nothing transformed the waiting game into a drama, to be played out hour by agonizing hour. Shauna's predicament at the end of the day described an archetypal situation: Even if the applicants were interviewed, they received no immediate indication of whether they were eligible for shelter, whether there was space, or when they would receive this information. Once they were accepted, they often heard nothing for hours about where they would be sheltered; or, in some cases, nothing about their acceptance at all. Many other applicants waited all day without information, only to learn at day's end that the office could offer them nothing.⁵³

verification of information is instructed to notify a recipient that she signed away any rights to refuse permission to contact third parties for verification of her statements when she applied for welfare. 1992 QUALITY CONTROL MANUAL, *supra*, at I-18.

52. See, e.g., Complaint at 16–20, *S.L. v. Whitburn*, No. 91-C-576 (E.D. Wis. filed June 3, 1991) (recipients of AFDC and food stamps alleging that private investigators hired by Wisconsin Department of Social Services entered their homes unannounced to ask personal questions of family members and friends). Some recipients received notice of termination of benefits as a result of unspecified instances of "failure to cooperate," even though they had allowed the investigators into their homes. The terminations were either reversed immediately, or after an administrative fair hearing. *Id.* at 16, 18, 20. The court enjoined further unannounced visits. Order, *Whitburn*, No. 91-C-576 (E.D. Wis. Aug. 19, 1994), *appeals filed* Nos. 94-3213, 94-3248 (7th Cir. 1994); see also Complaint, *Cummings v. Towle*, No. C.90-259-S (D.N.H. filed June 5, 1990) (alleging that after filing numerous applications for general assistance and pieces of documentation, most of which town's Welfare Officer did not use, plaintiffs received several unannounced visits by uniformed police officers, who asked for identical information and documentation and embarrassed applicants in front of their neighbors). The lengthy consent decree that settled the case included a prohibition of the use of uniformed personnel to investigate welfare applicants. Consent Decree and Order, *Cummings*, No. C.90-259-S (D.N.H. Apr. 17, 1992).

53. For example, one Friday afternoon, a student interviewed Charlene M., who had waited with her one- and two-year-olds all day, every day that week, until 7:00 or 8:00 p.m., only to be told to come back the next day. Within 20 minutes after the student had brought this to the attention of a supervisor, the woman was not merely accepted, but guaranteed a place at a specific shelter. Holly Baer, Monitoring Notes for Feb. 21, 1992, at 1–2 (Mar. 11, 1992) (on file with author) (OESSS Monitoring Project). On that same Friday the students met Kay B., a 19-year-old girl with a one-month-old baby, who had waited throughout the preceding day only to be told that nothing was available. On Friday, she waited until 2:30 p.m. to be told that the staff had lost her application; at 4:00 p.m., she was told to come back on Monday with a notarized statement from her friend affirming that the friend could no longer house her. *Id.* at 2. Other students interviewing applicants on different days reported similar stories. See Deull & Hammer, *supra* note 33, at 1, 2 (describing one woman who had been turned down on third of three full days of waiting with no information on her status, and noting similar circumstances for other families in preceding week).

This withholding of information about the availability of shelter and about applicants' status in line had been a feature of this shelter system for years.⁵⁴

Shauna's experience had also illustrated that the process of taking, assessing, and approving applications for shelter was completely random. It was clear that order of sign-in did not always guarantee one's place in line. On a different day, on which students spent eight hours in the waiting room and noted the presence of some twenty-five families, they observed that "the order in which applications had been turned in was irrelevant to the order [in which] applicants were seen."⁵⁵ Several similar experiences suggested to us that there was simply no way to predict when any applicant would be deemed to have completed any given step.⁵⁶

Occasionally, families were able to fill out applications, see a worker, and be approved for shelter, all before 9:00 or 10:00 a.m. But in these instances, they waited hours before receiving word on whether and where they would be placed.⁵⁷ At 3:30 p.m., Anna, a very young mother with a very young child, asked some students to find out for her where she had been placed, and how she would get there. Although she had been ruled eligible for shelter several hours before, the worker had refused to disclose this additional information. The students were told that a van would arrive at 6:00 p.m.; Anna was still waiting when they left.⁵⁸ As one student described the reactions of Nita, who had been turned down once before and waited for six hours before learning about her placement, "Nita wished that the workers would come out and at least tell them something during their long wait."⁵⁹

The existence of OESSS' notice to shelter applicants illustrates one instance of the distribution of misinformation.⁶⁰ Perhaps more commonly,

54. See Declaration of Clara Russell at 2-3, *Russell v. Barry*, No. 87-2072 (D.D.C. July 26, 1987) (relating story of evicted pregnant mother of three who waited for three hours at Pitts Hotel before being told that she could not be helped); Declaration of Brian Carome at 2-8, *Russell*, No. 87-2072 (D.D.C. July 26, 1987) (describing increasing pressure on church to house homeless families as result of District's turning away families without allowing them to apply for shelter, and detailing visit to waiting room of Pitts Hotel where 10 families had been told that they would have to wait until midnight for word on whether they would be sheltered).

55. Jelaso & Kline, *supra* note 29, at 1.

56. On my day, I noted one very young mother with a toddler, who reported signing in between 8:00 and 8:30 a.m., but who, as of 4:30 p.m., had not been seen; I myself saw several families enter and receive interviews before she did. The woman was seen as soon as these points were mentioned to the intake supervisor, who at first professed not to see her name on the sign-in sheet. One of the later arrivals who was seen quickly, and out of line, was a married couple with two daughters and a third child on the way; I attributed the promptness in this case to the mother's extreme state of pregnancy, and to the rare presence of a male, whom the male intake supervisor appeared to treat respectfully. Susan Bennett, February 28, 1992—Notes on Monitoring at OESSS (Feb. 28, 1992) (on file with author) (OESSS Monitoring Project).

57. Deull & Hammer, *supra* note 33.

58. Finkler & Kennedy, *supra* note 1, at 6-7; see also Jelaso & Kline, *supra* note 29, at 3-4 (describing situation of Michelle, who had been approved for shelter early that morning, but as of 5:00 p.m. had received no word as to placement or transportation).

59. Alec Deull & Diann Hammer, Family Intake Sheet (Feb. 7, 1992) (on file with author) (OESSS Monitoring Project).

60. A recently formulated jurisprudence of benefits law even shifts the costs of bureaucratic misinformation from the caseworkers who deliver the information to the poor people who rely on it. In

workers fail to inform poor people about benefits or fail to let them know when they might be eligible for assistance. As studies suggest⁶¹ and examples from litigation illustrate,⁶² applicants for food stamp benefits are frequently not informed about the option of applying for expedited food stamps. Intake workers fail to advise applicants of other services or benefits beyond those that the applicants have explicitly requested.⁶³ This individual failure is replicated, and encouraged, by the failure of whole agencies to publicize their benefits to poverty populations, through satellite offices or outreach workers.⁶⁴

Applicants for assistance are as dependent on intake workers for information about the availability of an appeals process as they are for information about any other part of the benefits system. Handler's and Scott's

Office of Personnel Management v. Richmond, 496 U.S. 414 (1990), the Court held that a former government employee who forfeited a portion of his disability retirement pay as a result of relying on the erroneous advice of an agency employee could not assert estoppel against the government. The Court cited Judge Friendly's dissent in *Hansen v. Harris*, 619 F.2d 942, 949 (2d. Cir. 1980), *rev'd sub nom. Schweiker v. Hansen*, 450 U.S. 785 (1981), as support for its argument. *Richmond*, 496 U.S. at 433. Judge Friendly castigated the majority for allowing estoppel against the Social Security Administration based on erroneous advice that deterred a widow from filing a claim on time. As Judge Friendly said, there was no justification for disbursing undeserved funds from the Treasury "simply because the Federal Government has not been able to secure perfect performance from its hundreds of thousands of employees scattered throughout the continent." *Harris*, 619 F.2d at 954.

61. See GENERAL ACCOUNTING OFFICE, DOC. NO. GAO/RCED-89-4, FOOD STAMP PROGRAM: ADMINISTRATIVE HINDRANCES TO PARTICIPATION 19-21 (1988).

62. See Order at 1-2, 4, *Southside Welfare Rights Org. v. Stangler*, No. 90-4271-CV-C-66BA (W.D. Mo. Jan. 25, 1993) (citing preliminary injunction issued Aug. 23, 1990, and magistrate's findings that defendants failed to identify between 14.95 and 21.43% of eligible applicants for expedited food stamps); Complaint at 9, *Darts v. Ibarra*, Civ. Action No. 91-S-1003 (D. Colo. filed 1991) (alleging that applicant visited assistance office four times before being screened for emergency stamps, and was pressured, incorrectly, into withdrawing her AFDC application because she was receiving child support); Settlement Agreement, *Hatten-Gonzales v. Valdez*, No. CIV 88-0385 (D.N.M. filed Aug. 28, 1990) (alleging failure to screen for emergency food stamps); *Harley v. Lyng*, 653 F. Supp. 266, 271 (E.D. Pa. 1986) (noting that several county assistance offices only screened applicants for expedited issuance if they asked for it specifically, that these and other offices would wait as long as two weeks to screen application forms for eligibility for expedited issuance, and that a few offices discouraged applicants for expedited service by making it known that receipt of expedited service would delay receipt of cash public assistance benefits); see also Findings and Order of Reference to Special Master at 4, *Franklin v. Kelly*, Civil Action No. 90-3124 (D.D.C. Sept. 24, 1992) (finding that approximately 28% of those denied or not screened for expedited issuance in District of Columbia were in fact eligible for benefit).

63. Several studies show workers' tendency to withhold information about the application process and about the availability of other benefits even when processing claims at hand correctly and treating applicants courteously. See Evelyn Brodtkin & Michael Lipsky, *Quality Control in AFDC as an Administrative Strategy*, 57 SOC. SERV. REV. 1, 22 (1983); J.L. Mashaw, *Welfare Reform and Local Administration of Aid to Families with Dependent Children in Virginia*, 57 VA. L. REV. 818, 833-34 (1971); Tana Pessio, *Local Welfare Offices: Managing the Intake Process*, 26 PUB. POL'Y 305, 309-11 (1978); Michael R. Sosin, *Decentralizing the Social Service System: A Reassessment*, 64 SOC. SERV. REV. 617, 620 (1990).

64. See GOVERNMENT ACCOUNTING OFFICE, FOOD STAMP PROGRAM: A DEMOGRAPHIC ANALYSIS OF PARTICIPATION AND NONPARTICIPATION 22-23 (1990) (citing outreach provisions of Hunger Prevention Act of 1988, Pub. L. No. 100-435, 102 Stat. 1645, in support of recommendation that Food and Nutrition Service improve rates of participation in the food stamp program by increasing outreach efforts); see SOCIAL SEC. ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., SUPPLEMENTAL SECURITY INCOME MODERNIZATION PROJECT; FINAL REPORT BY THE EXPERTS, 57 Fed. Reg. 40,732, 40,777 (1992) (noting that certain groups such as homeless persons and children had been underserved by recent outreach efforts, and that supplemental funding for outreach had not included critical additional funds for administrative support).

early surveys of social service workers' attitudes about pre-*Goldberg* fair hearing processes—the former from a statewide sample in Wisconsin, the latter drawn from a national mail survey—supported the conclusion that line workers routinely withheld information about fair hearing processes from claimants.⁶⁵ While several explanations are possible, it is clear that few applicants for or recipients of assistance avail themselves of fair hearings.⁶⁶ Workers may be understandably ambivalent about revealing how to open themselves, and the system they administer, up to challenge. On the other side, clients or applicants may be cautious about challenging the hands that feed them.

On paper, the public benefits system guarantees applicants access to information about process—needed to make critical economic and personal decisions; information about what proof of eligibility they legitimately may be called upon to provide;⁶⁷ information about the true availability of benefits;⁶⁸ prompt, written determinations of eligibility;⁶⁹ and information about the particulars of participation in administrative hearings.⁷⁰ In theory, if applicants were aware of these protections, disentanglement would be impossible. In fact, as the shelter narratives and other examples have suggested, many applicants for public benefits are at the mercy of workers who withhold information and impose arbitrary terms, in unfamiliar settings and under conditions of great stress.

E. *Faces of Discouragement: Isolation and Intimidation*

Families seeking shelter in the District of Columbia have always had to do so at one centralized location.⁷¹ The administrative office of OESSS occupied

65. Joel F. Handler, *Justice for the Welfare Recipient: Fair Hearings in AFDC—The Wisconsin Experience*, 43 SOC. SERV. REV. 12, 19 (1969); Robert E. Scott, *The Reality of Procedural Due Process—A Study of the Implementation of Fair Hearing Requirements by the Welfare Caseworker*, 13 WM. & MARY L. REV. 725, 753 (1972) (noting that caseworkers by and large are ambivalent about worth of fair hearings process to clients, thereby implicitly discouraging them from requesting fair hearings).

66. Statistics from the Administration for Children and Families indicate that 11.1% of the total 120,843 requests for hearings concern denials of applications, compared to 28.8% contesting the amount of the grant and 22.9% contesting terminations of assistance. OFFICE OF FAMILY ASSISTANCE, U.S. DEP'T OF HEALTH & HUMAN SERVS., QUARTERLY PUBLIC ASSISTANCE STATISTICS: FISCAL YEAR 1991, at 153 tbl. 95 (1991); see also Memorandum from Holloway Wooten, Chief, Office of Fair Hearings, Government of the District of Columbia, to Helen R. Keys, Chief, OESSS 1 (Jan. 21, 1993) (response to Freedom of Information Act request of Nov. 29, 1992) (on file with author) (indicating that only three fair hearings contesting adverse actions by OESSS were held during fiscal year 1992).

67. See 45 C.F.R. § 206.10(a)(2)(i) (1993).

68. Applicants for AFDC have the right to be notified about the availability of interim aid and about general program coverage. *Id.* Applicants for food stamps must be given a description of expedited food stamp services, 7 C.F.R. § 273.2(b)(vi) (1994), and must be told that their benefits will be distributed retroactively to the date of application, *id.* § 273.2 (b)(vii).

69. See 45 C.F.R. § 206.10(a)(4) (establishing that unsuccessful applicants are entitled to written determination of ineligibility, including notice of right to request fair hearing).

70. See *id.* § 205.10(a)(3)(i)–(iii).

71. From 1987 to 1990, OESSS intake for families was housed in the Pitts Hotel. According to OESSS' own internal operational guidelines, intake was open for 24 hours a day, seven days a week. Deposition of Ricardo Lyles, Acting Chief of OESSS, Exhibit 1, at 1, Russell v. Barry, No. 87-2072

one three-story building in a block of convenience and liquor stores in southwest Washington. Shelter referral was the only service provided by this office. For homeless families to apply for AFDC, food stamps, medical assistance, or emergency assistance, they had to go to one of twelve local DHS offices.⁷² The easiest of these to reach by public transportation was in Anacostia, only one bus ride away; to get to any of the other "decentralized service centers" by bus required at least one transfer.⁷³

The waiting room was a large space, with a bare linoleum floor and a ring of orange and lemon-yellow molded plastic chairs around its edge. Every applicant at OESSS had at least one child with her, from infants under two months old to teenagers. Most mothers observed the "no eating" sign. Baby bottles seemed to be tolerated, but other drinks were not. Therefore, mothers gave their older children soda in baby bottles,⁷⁴ a necessary accommodation where the one drinking fountain was broken and there were no cups for getting water from the faucet in the public bathroom. Apart from that bathroom, there were no changing tables; apart from whatever the mothers brought with them, there were no toys, crayons, or paper for the older children.

The random order in which workers processed applications, the absence of information, and demand for the applicant family's constant physical presence heightened the personal and physical isolation of the applicants for shelter. Since they were told nothing about their place in line or how far down the list the workers had progressed, and since the order of sign-in and places in line were not respected anyway, mothers could never leave the waiting room for fear of losing their chance at an interview. Once they were interviewed, they could not leave the room for fear of missing out on the crucial news that they had been accepted for placement; once placed, they could not leave for fear of losing their ride to their undisclosed place of shelter. The universally perceived and broadcast requirement that children be present at the time of application further trapped young mothers with fussing infants and impatient older children in the waiting room for hours at a time. The rule against eating guaranteed that hunger would contribute to the frustration.

It would have been logical for intake workers to inform applicants early in the process about their realistic chances of obtaining a bed. Such a practice would have enabled the applicants to decide whether waiting all day for

(D.D.C. Sept. 3, 1987).

72. See DEPARTMENT OF HUMAN SERVS. FOR THE DIST. OF COLUMBIA, DIRECTORY OF SERVICES 15-16 (1987).

73. The trip to the Anacostia office is estimated to take 10 minutes by bus, not counting waiting or walking time. Travel via Metro between all other decentralized service centers and OESSS requires a transfer to a bus or another Metro line. Bus and minimum Metro fare is \$1 within the District, with one free transfer per ride. All information about travel routes, fares, and travel time comes from the information office of the Washington Metropolitan Area Transit Authority. Callan Carter, Results of Telephone Survey (Oct. 1992) (on file with author) (OESSS Monitoring Project).

74. Deull & Hammer, *supra* note 33, at 3.

something to open up was worth forgoing opportunities to secure other benefits, or other shelter. The issue was not any difficulty in acquiring and conveying this information. Rather, the issue was one of keeping the applicants in ignorance, as a way of ensuring their physical accountability. Information was controlled and processes kept secret to guarantee that the applicant remained dependent not merely on the worker's good offices, but on the worker's good office. The applicant had no choice but to endure being shackled to the physical place.⁷⁵

In such an environment, homeless families became what Sarat has described as being "spatialized"; that is to say, "having someone else's place triumph over their time."⁷⁶ Welfare waiting rooms share a culture of domination, and in that commonality come to look and feel alike.⁷⁷ The twentieth-century intake experience intensifies the most coercive practices of discouragement that have always been evident in welfare administration—the intrusive questioning, the demands for superfluous documentation—by providing an arena for them in the most intimidating of nineteenth-century institutions—the municipal public welfare building of separate location and specialized function. The only difference between the nineteenth-century orphans' home or workhouse and the twentieth-century shelter intake office, is that the former deterred entry by its conspicuousness, its show of power, and its bulky physicality; the latter deters by its inconvenient sequestration.⁷⁸ Both use fear of isolation to induce dependency. The shelter intake office combines the command for unilaterally imposed personal connection, with the condition that the connection occur in one place.

The attention of outsiders was perceived as a significant threat to the invisible operations of the waiting room.⁷⁹ During one shelter monitoring day, a worker openly warned the remaining applicants in the waiting room to refrain from talking to the students. On this occasion, a woman who had been expelled from a shelter after two-and-a-half months of residency because of a

75. Austin Sarat, ". . . *The Law Is All Over*": *Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUMAN. 343, 345–46, 360 (1990).

76. *Id.* at 360.

77. As the District of Columbia's food stamp centers have been described:

The point at which the client often becomes degraded, and the food stamp program most intolerable, is in the waiting area. Applicants speak of waiting day after day for service. . . . The atmosphere of intake centers is a breeding ground for hostility from both workers and clients. Clients perceive the District as incapable, workers are made to feel inadequate, and, most unfortunately, clients are humiliated.

Franklin Special Master's Report, *supra* note 37, at 38.

78. One historian has noted how the imposing physical structures in which 19th-century institutions of public welfare were housed served two functions: objects of civic pride for the middle-class citizens who supported them, and instruments of governmental coercion for the indigent citizens whose families were often separated so that children could enter them. Eric H. Monkkonen, *Nineteenth-Century Institutions: Dealing with the Urban "Underclass"*, in THE "UNDERCLASS" DEBATE 334 (Michael B. Katz ed., 1993).

79. See Affidavit of Franzin Melton at 4, *Washington Legal Clinic for the Homeless v. Kelly*, No. 92-1894 (D.D.C. Aug. 6, 1992) (describing experience of shelter applicant threatened with loss of opportunity to apply as result of conferring with attorney).

week-long hospitalization approached the students for assistance. She informed them that this was her second trip to OESSS to provide acceptable documentation of her hospitalization, and needed to know what to do next. The students reported:

[An intake worker] called R. over and threatened her. She told R. not to "bite the hand that feeds" her and that we would put R's name in the newspaper and tell everyone her story. R. told us this part of the story on the sidewalk, because she was terrified to speak with us within sight of [the worker]⁸⁰

The incident illustrates the ease with which agency personnel could turn their fears of intrusion by third parties into retaliation. Later that day, the director of OESSS ejected the same two students from the waiting room. Subsequently, she explained that she had acted to shield the clients from unhelpful agitation—that advocacy was inappropriate to the waiting room, and that the focus of social work and the focus of legal work were incompatible.⁸¹ These reactions reflect heartfelt concerns, but also reveal a possessiveness of applicants' time and space from which applicants may need continuing outside protection.

The mere presence of outsiders in the waiting room can threaten applicants' already insecure positions; it can also help applicants by jolting intake workers from conducting business as usual.⁸² The official system of public benefits acknowledges that dependence on the welfare office alone for information and benefits makes applicants susceptible to intimidation. Regulations provide for the intervention of outside influences, such as written information on the process and the right to the assistance of third parties. Indeed, the applicant has the option of enlisting a friendly presence—a lawyer,

80. Alec Deull & Diann Hammer, Memorandum of 3/6/92 Visit to OESSS Intake 2 (Mar. 6, 1992) (on file with author) (OESSS Monitoring Project).

81. *Id.* at 3. The chief of the shelter office reiterated in her affidavit in support of respondents' case in *Washington Legal Clinic for the Homeless v. Kelly* that her remarks to the students on that day were prompted by her conviction that she and her staff truly understood the needs of the client population, the complexity of which the WLCH volunteers did not appreciate, and that the activities of the monitoring group were antithetical to those needs. Affidavit of Helen R. Keys, Acting Chief, *Washington Legal Clinic for the Homeless*, No. 92-1894 (D.D.C. Sept. 14, 1992).

82. Observers of other settings in which poor people's entitlements are formally or informally allocated have noted that the presence of third parties changes the dynamic in the applicant's favor. See Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 562-63 (1992) (noting tenants' success in defending claims in very small percentage of landlord-tenant cases in which tenants were observed to be accompanied by nonlawyer friends or relatives). Professor Mashaw has gone so far as to look wistfully at HEW's pre-*Goldberg* provision of free legal counsel to fair hearing claimants, as the "single most important innovation that could have been made for the protection both of the claimants' substantive rights and of their sense of control over the bureaucratic complexities of claims validation." JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 261 (1985) (footnote omitted).

a sister, a friend—at any stage of the process.⁸³ Nevertheless, in fair hearing settings, few avail themselves of this option.⁸⁴

The waiting room's physical isolation and lack of access to assistance contrasts dramatically with the bustling, marketlike waiting area outside a public courtroom. The physical demarcation between the courtroom corridor and the courtroom is clear: The adjudicator controls outcomes in the latter, and not in the former. Not so in the OESSS. Although the physical distance between waiting room and interview offices may seem infinite to the applicant, there is no true demarcation. The decision makers are able to control outcomes based on whether they approve of interventions and communications going on outside their doors. While the tenant going into or coming out of rent court can engage in an interview, or meet with a lawyer, without fear of retaliatory measures by the magistrate, the family applying for overnight shelter enjoys no such luxury. Every communication it makes with somebody outside the application process is completely visible to those who control the process within.

F. *The Effects of Discouragement—The Clients*

Virtually all the homeless female heads of household we met had arrived at the OESSS waiting room after punctuated pilgrimages from one temporary housing situation to another. Most had moved back and forth at least twice between the dwellings of families and friends.⁸⁵ At least ten of the families had moved from the units of relatives who were themselves housed in scarce public or subsidized housing, where sharing shelter with unauthorized occupants was forbidden.⁸⁶

83. While the relief prescribed in *Goldberg* included the right to rely on counsel *during* a fair hearing, not before, *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970), regulations dictate that the state agency must notify the aggrieved applicant or recipient that she may be represented at a fair hearing by "an authorized representative, such as legal counsel, relative, friend, or other spokesman," 45 C.F.R. § 205.10(a)(3)(iii) (1993), and may be assisted in the application process at any stage, by any person, who "need not be a lawyer," *id.* § 206.10(a)(1)(iii).

84. Of the 40,857 administrative fair hearings on AFDC cases disposed of by hearing decision in fiscal year 1991, in 3437, or 8.4%, claimants were represented by legal counsel. Of the four hearing requests reported as disposed of by decision in the District of Columbia, one involved counsel. OFFICE OF FAMILY ASSISTANCE, *supra* note 66, at 157 tbl. 99.

85. Cf. JAMES R. KNICKMAN & BETH C. WEITZMAN, A STUDY OF HOMELESS FAMILIES IN NEW YORK CITY 9–11 (1989) (observing same phenomenon in New York City); Peter H. Rossi, *Troubling Families*, 37 AM. BEHAV. SCIENTIST 342, 364 (1994) (reviewing studies that show prevalence of "doubling up" with primary leaseholders prior to entrance into family shelter).

86. See D.C. Mun. Regs. tit. 14, § 6103.5 (1991) (specifying that, for apartments in the District's public housing system, "[e]ach dwelling unit shall be used solely as a residence for the tenant and the tenant's family as represented in the application for housing, and the dwelling lease"). Additional household members can be added to the lease only as the result of birth or of "operation of law" such as marriage. *Id.* § 6205.5; see also 24 C.F.R. § 966.4(f)(3) (1994) (limiting tenant's rights under lease to use of unit only for household as identified in the lease); Marguerite V. Marin & Edward F. Vacha, *Self-Help Strategies and Resources Among People at Risk of Homelessness: Empirical Findings and Social Services Policy*, 39 SOC. WORK 649, 650 (1994) (noting findings that over half of evictions precipitating family homelessness

The conditions that produced homelessness for the women we met bespoke material and physical insecurity. These, in turn, imply an inevitable, accompanying emotional insecurity. However, in contrast to studies suggesting that family homelessness is, in part, caused by personal dysfunction and the attenuation of past familial ties,⁸⁷ our experience and researchers' findings indicate otherwise: not that family ties were loose, but that the tensions of severe overcrowding had strained them to the point of breaking.⁸⁸ The precariousness of the families' financial situations, and the paucity of affordable housing in the private market⁸⁹ almost guaranteed that even if families were sheltered and then placed into permanent housing, circumstances would throw them back into the waiting room sometime soon again.⁹⁰ Whether instability produces or results from life on the streets, it makes certainty perhaps the most desirable of commodities—the one that homeless women had the most right to expect from an office with the mission to assuage distress, and the one that they were least likely to receive.

If the experience of welfare waiting rooms is anything, it is destabilizing. I have already noted the physical and emotional disorientation caused by confinement in an atmosphere of unpredictability. But at a more concrete level, verification extremism and other features of disenfranchisement make poor people's incomes insecure. Verification extremism exacerbates the problem of "churning" practiced in many welfare offices. "Churning" consists of the rapid administrative closure of welfare cases, usually as a result of the recipient's inability to comply with a request for verification of eligibility or failure to arrive at a scheduled appointment with the intake caseworker or to meet some

are from homes of friends or relatives, who themselves may be at risk of homelessness).

87. See Ellen L. Bassuk & Lynn Rosenberg, *Why Does Family Homelessness Occur? A Case-Control Study*, 78 AM. J. PUB. HEALTH 783, 784–85 (1988) (finding patterns of extreme housing and personal instability in a study of women living in Boston area shelters). For a different view, positing homelessness as the result of the disjuncture between income and housing costs, see Elizabeth A. Mulroy, *The Housing Affordability Slide in Action: How Single Mothers Slip into Homelessness*, in HOMELESSNESS: NEW ENGLAND AND BEYOND 203 (Padraig O'Malley ed., 1992).

88. See D.C. DEP'T OF HOUS. & COMMUNITY DEV., COMPREHENSIVE HOUSING AFFORDABILITY STRATEGY OF THE DISTRICT OF COLUMBIA, 1992–1996, at 52 (1991) (stating that number of housing units considered to be overcrowded increased from 1800 in 1985 to 9800 in 1990); see also Marybeth Shinn et al., *Social Relationships and Vulnerability to Becoming Homeless Among Poor Families*, 46 AM. PSYCHOLOGIST 1180, 1185 (1991) (finding that homeless families actually report more extensive contacts with family and friends than do housed poor families, and that exhaustion of those contacts precipitates homelessness).

89. See D.C. DEP'T OF HOUS. & COMMUNITY DEV., *supra* note 88, at 6–7 (documenting severe loss of affordable housing units); MARGERY A. TURNER, THE URBAN INST., RENT CONTROL AND THE AVAILABILITY OF AFFORDABLE HOUSING IN THE DISTRICT OF COLUMBIA 23–24 (1988).

90. A study of homeless families in New York City documented a cycle of placement into permanent housing, and then return into homelessness: Half of the families then applying for permanent housing had been placed by the city in housing before. NEW YORK CITY COMM'N ON THE HOMELESS, THE WAY HOME: A NEW DIRECTION IN SOCIAL POLICY 75 (1992) [hereinafter THE WAY HOME]. But see D.C. Mun. Regs. tit. 29, § 2502.1(f)(1)–(3) (1992) (ruling out as ineligible for shelter in the District of Columbia any adult previously placed in permanent housing who has lost his or her housing through eviction for nonpayment of rent).

other deadline.⁹¹ In the late 1980's, churning caused the closure of tens of thousands of cases a year.⁹²

The practice of churning explains why homeless persons are underrepresented among the ranks of benefits holders, despite their indisputable financial eligibility.⁹³ Homelessness increases the impact of churning practices simply because rootless families cannot keep, or never receive notice of, the multiple appointments demanded for confirmation of eligibility.⁹⁴ When homeless recipients fail to meet these administrative burdens, workers churn them off the benefit rolls. One unusually detailed study tracking the experiences of homeless recipients of nonemergency public assistance in New York City found that over seventy-five percent of the clients studied had their benefits terminated within six months of first receiving them.⁹⁵ The study blamed this high incidence of churning on the recipient's difficulty in receiving or responding to the many notices of required recertification appointments that welfare offices in New York regularly mail to all recipients.⁹⁶ The study also

91. For a discussion of the destructive impact of churning upon destitute families, see Anna L. Dehavenon, *Charles Dickens Meets Franz Kafka: The Maladministration of New York City's Public Assistance Programs*, 17 N.Y.U. REV. L. & SOC. CHANGE 231 (1989-90); see also REPORT OF THE COMM. ON ADMIN. LAW OF THE BAR ASS'N OF THE CITY OF NEW YORK, ADMINISTRATIVE CLOSINGS AND CHURNING OF WELFARE CASES (1990).

92. In a review of data on AFDC cases closed by the Illinois Department of Public Aid, the Legal Aid Bureau of Chicago found that, for June 1, 1988, through May 31, 1989, of the 108,356 AFDC cases closed, 29,053 were closed for otherwise eligible families for reasons of "non-cooperation" (failure to verify earned income, or failure to return forms); an additional 10,180 cases were closed because recertification notices were returned, marked as addressee unknown. (As the Legal Aid Bureau pointed out, some recipients live in substandard housing without mailboxes.) Letter from Thomas Grippando to David Peterson, General Counsel, Illinois Department of Public Aid 1 (Aug. 23, 1989) (on file with National Clearinghouse for Legal Services, Inc.). First quarter fiscal year 1992 data for AFDC show that, nationwide, 50% of all denials of applications for AFDC were for "failure to comply with procedural requirements" as compared to 28% for "income exceeds standards" or 6% for "not deprived of support or care." OFFICE OF FAMILY ASSISTANCE, QUARTERLY REPORT OF STATE-REPORTED DATA ON AID TO FAMILIES WITH DEPENDENT CHILDREN 27 (1992).

93. See, e.g., Martha R. Burt & Barbara E. Cohen, *A Sociodemographic Profile of the Service-Using Homeless: Findings from a National Survey*, in 2 HOMELESSNESS IN THE UNITED STATES 17, 24 (Jamshid A. Momeni ed., 1990) (presenting national sampling of 1704 homeless users of shelters and soup kitchens indicating that 33% of respondents with families received AFDC); Peter H. Rossi & James D. Wright, *The Determinants of Homelessness*, 6 HEALTH AFF. 19, 23 (1987) (presenting street and shelter survey of homeless in Chicago finding that 28% of people interviewed received either AFDC or general assistance); Memorandum from H.R. Crawford, Committee on Human Services, to Members of the Council of the District of Columbia Regarding Bill 8-156, the District of Columbia Emergency Overnight Shelter Amendment Act of 1990, at 3 (May 10, 1990) (on file with author) (reporting that 48% of residents of family shelters in District of Columbia were receiving AFDC).

94. Macro Sys., Inc., 1 Homeless Families with Children: Programmatic Responses of Five Communities 11 (May 1991) (unpublished study, on file with author).

95. Legal Action Ctr. for the Homeless, *A Long Day's Journey into Night: Tracking Applicants Through the Entitlements Maze* 9 (July 1993) (unpublished study, on file with author). The study's sample consisted of 1638 clients who visited the Legal Action Center's legal clinics between March 1990 and October 1990 and received letters of referral to city welfare offices for public assistance, food stamps, and Medicaid. *Id.* at 3.

96. *Id.* at 12.

noted that fewer than half of the individuals in its sample succeeded in opening a public benefits case.⁹⁷

The formal system of protections for welfare applicants and recipients offers little to redress the invisible injuries inflicted in the preapplication "twilight zone." In the AFDC program, the statute requires the state to provide a fair hearing if a "claim for aid" is "denied or not acted upon with reasonable promptness."⁹⁸ Regulations obligate the state to inform "[e]very *applicant or recipient*" of the right to a hearing and the rights associated with it, "at the time of application and at the time of any action affecting his claim."⁹⁹ Where the unit of grievance is "the claim," and the triggering mechanism for complaint is the "time of application," needy persons who never reach the formal application stage are denied formal redress.

The concrete harm of disentanglement can be measured in benefits lost. However, the unquantifiable, and perhaps greater, harm is a dampening of the spirit, a lowering of expectations of any kind of fair treatment or favorable result from a bureaucratic system. Lipsky describes this effect as a residuum of "disentanglement."¹⁰⁰ It is this reduction in poor persons' expectations, as much as the reduction of services, that makes disentanglement tactics effective.¹⁰¹

Lipsky and Smith have hypothesized that, once a hardship receives a name and a means of redress, people will reconceptualize as deprivations conditions that they previously have endured in silence.¹⁰² Until they learn that they may seek access to alternative shelter, families will live tripled or quadrupled up in substandard housing; or, as was the case with Wendy, will suffer the constant threat of physical or sexual abuse. But as some commentators have noted, disadvantaged people are all too well accustomed to enduring bureaucratic injustices as the cost of survival, and may be unable or unwilling to perceive them as actionable injury.¹⁰³ Thanks to the informal workings of disentanglement, the Wendys and the Shaunas may never enjoy the transformative exercise of translating their experiences into claims. Blocked from the affirmative act of claiming, they must watch as others define their needs, the origin of their needs, and their very selves for them.

97. *Id.* at 7.

98. 42 U.S.C. § 602(a)(4) (1988) (emphasis added).

99. 45 C.F.R. § 205.10(a)(3) (1993) (emphasis added).

100. Lipsky, *supra* note 5, at 4; see also GENERAL ACCOUNTING OFFICE, DOC. NO. GAO/PEMD-89-SBR, FOOD STAMPS: REASONS FOR NONPARTICIPATION 20 (1988) (noting that 33% of survey respondents who were eligible to participate in food stamp program but failed to apply cited fear of "administrative hassles" and lack of physical access as reasons for not applying).

101. Lipsky, *supra* note 5, at 4, 8.

102. Michael Lipsky & Stephen R. Smith, *When Social Problems Are Treated as Emergencies*, 63 SOC. SERV. REV. 5, 14 (1989).

103. See William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631, 636-37 (1980-81) (coining term "grievance apathy" to describe inability to perceive experiences as injurious and postulating that this inability results from an unequal distribution of resources).

III. CAUSES OF DISCOURAGEMENT

Bureaucratic disentanglement is a clandestine method of cutting back on benefits, which, by the informal reduction of services, saves money and avoids the strain and uncertain outcome of open political debate over welfare spending and policy.¹⁰⁴ Lipsky emphasizes that the use of the extralegal practices reflects the community's inability to reach consensus about the goals of social welfare policy.¹⁰⁵ This Part examines the circularity of bureaucratic disentanglement and the way in which it works simultaneously and synergistically at the level of the individual worker-to-client relationship, in the creation of office policy, and within the framework of the federal regulatory scheme.

In the following discussion, I will focus on how the interplay of personal and structural forces may influence the decisions of individual workers. Individual workers inherit a legacy of conflict concerning the role of public relief: whether it should serve unconditionally to enhance the personal autonomy of the recipient, or whether it should be awarded after scrutiny to effectuate the purposes of the giver. That conflict has historical antecedents, and is perpetuated almost daily throughout the hierarchy of welfare administration. Present-day verification ceremonies, of which line workers are the celebrants, embody that conflict. In that context, far from seeming to be the expression of the sadism or callousness of individual caseworkers, verification extremism and other forms of discouragement seem almost institutionally inevitable.

A. *The Pressures on the Individualized Encounter*

1. *The Changing Significance of "Face Time" in the History of Welfare Administration*

Of all the beliefs *Goldberg v. Kelly* expresses, the one that has resonated the loudest and farthest is that justice for the welfare recipient depends on protection of her power to engage the dispenser of benefits—and to dictate the terms of that engagement.¹⁰⁶ There is, indeed, a history of "recipient-centered" welfare administration. It is very short. For want of any other readily defined boundaries, it could be said to begin with *Goldberg* and end with

104. Blasi, *supra* note 5, at 593; Lipsky, *supra* note 5, at 4; see also Evelyn Z. Brodtkin, *The Making of an Enemy: How Welfare Policies Construct the Poor*, 18 LAW & SOC. INQUIRY 647, 662–63 n.37 (1993) (reviewing JOEL F. HANDLER & YEHESEKEL HASENFELD, *THE MORAL CONSTRUCTION OF POVERTY* (1991)) (noting that welfare administration addresses welfare policies too "contentious" to be resolved through openly political legislative process).

105. Lipsky, *supra* note 5, at 6.

106. See *Goldberg v. Kelly*, 397 U.S. 254, 268–69 (1970) ("The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard.").

Wyman v. James.¹⁰⁷ In between, an astonishing burst of regulatory liberalization did indeed empower the recipient to set the terms: of how, when, and where she would apply for assistance; of what she would reveal of the physical and emotional interior of her life; and of how she would demand an accounting and justification from the state of any adverse action. What was more, she could qualify based, literally, on her "own capacity to be heard"—on her uncorroborated words.

Central to belief in recipient-centered welfare is the faith in the power of the physical encounter to ensure fairness; again, an encounter that, in some modern benefits programs, the recipient theoretically controls.¹⁰⁸ But bracketing this same brief period of liberalization, the trend has been toward practices embodying vastly different premises concerning the purpose of personal contact in welfare administration. For instance, in the early 1900's, practitioners of "scientific charity" made an ongoing relationship between agent and applicant necessary to a determination of need. This intense personalization of relief required the repeated physical presence of the agent, the "friendly visitor," in the recipients' homes, and in their lives.¹⁰⁹ The organization's agent repeatedly visited the applicant's home to assess the applicant's needs and desire to work; to determine the precise amount and kind of assistance necessary to alleviate distress without eroding character; and to serve as the conduit through which all material assistance would flow to the recipient.¹¹⁰ Under such a scheme, the question of how persons were to prove themselves qualified for any particular benefit would never arise as a discrete issue. The constant process of monitoring qualifications—the character

107. In *Wyman v. James*, 400 U.S. 309 (1971), the Supreme Court rejected the premise that the Fourth Amendment protected a welfare recipient's right to refuse a social worker's home visit. Apart from its legal theories, the Court relied on two factual excuses to justify its opening up of recipients' homes to welfare investigations. First, it emphasized that the situation in the *James* case did not resemble that presented by "midnight raids" of the recipient's home to make sure that no unreported source of support existed. Second, the Court stressed that the holding did not condone the sort of massive invasion of privacy that midnight raids entailed. *Id.* at 326. Nevertheless, nothing in the opinion explicitly prohibited such raids. The Court also found reassurance in certain protective regulations: safeguards on individual privacy, prohibition on forcible entry, and reliance on the recipient as the primary source of information for documentation of eligibility. *Id.* at 321. Yet amendments to the regulations two years later eliminated these very safeguards. See 38 Fed. Reg. 22,007 (1973).

108. For example, in the context of recoupment of allegedly erroneously awarded Social Security disability benefits, in *Califano v. Yamasaki*, 442 U.S. 682 (1979), the Supreme Court found fairness required the Social Security Administration to afford recipients a pre-recoupment hearing, since the Administration could only ascertain the validity of recipients' claims of good-faith ignorance of the error through personal contact. *Id.* at 697; see also 38 C.F.R. § 3.103(c) (1994) (guaranteeing applicants for veterans' benefits a personal hearing upon request).

109. For summaries of the 19th-century debates over the appropriate goals of relief and the effectiveness of different models of delivery, see ROBERT H. BREMNER, *FROM THE DEPTHS: THE DISCOVERY OF POVERTY IN THE UNITED STATES* (1956), and MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* 36–84 (1986).

110. LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE* 61–63 (1989) (describing "scientific charity" and its practitioners' theories of "pauperism").

of the recipients, their changing needs, and their use of what was measured out to them—was inseparable from the giving of relief.¹¹¹

In contrast, the social work practitioners and theoreticians of the New Deal envisioned the “face-to-face” not as a means to control the recipient and the uses of relief, but as a way to administer welfare based upon a mutually respectful exchange between the worker and the applicant. The writings of Charlotte Towle, architect of New Deal social work practice, made it clear that the intended task of the social caseworker was both to offer therapeutic intervention and to assert an advocacy position on behalf of her clients. Thoughtful investigation into clients’ problems would give caseworkers the means to offer assistance with dignity, and the credibility to bear witness to the greater community of “the cost of unmet human need.”¹¹²

Towle was particularly concerned that caseworkers would undercut this advocacy approach by demanding that clients tender excessive proofs of eligibility.¹¹³ These forebodings were realized in practice. Despite the ideals of the founders, the structure of the children’s aid program of the Social Security Act gave states tremendous latitude to set the conditions and administration of relief. As a result, states could actively encourage, or tacitly permit, workers to continue historic exclusionary screening practices based on race and value-laden assessments of character.¹¹⁴ States resurrected the

111. See, e.g., MICHAEL B. KATZ, *POVERTY AND POLICY IN AMERICAN HISTORY* 17–40 (1983) (reconstructing involvement of Sullivan family with the Philadelphia Society for Organizing Charity).

112. See, e.g., Charlotte Towle, *Social Case Work in Modern Society*, 20 SOC. SERV. REV. 165, 174 (1946). Towle emphasized that administrators of public assistance programs ignored at their moral peril the effects of depressing welfare payment levels: “For example, in many instances there is a lack of realization that a person who is granted his statutory rights to far less than he needs will feel that his rights as a human being have been violated.” *Id.*; see also William H. Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431, 1437 (1986) (stating that social workers who were advocates for the New Deal viewed poverty as a societal failure, and saw government as obligated to provide basic subsistence income). Modern commentators have credited Towle and her peers with influencing Congress to include the fair hearing right in the original Social Security Act. See, e.g., William H. Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1, 6 (1985).

113. See CHARLOTTE TOWLE, *COMMON HUMAN NEEDS* 24 (Nat’l Ass’n of Social Workers 1987) (1945).

114. The history of personalized relief programs is replete with examples of the exercise of racial and other personal prejudices by social service providers evaluating the “fitness” of a candidate for relief. Consider, for example, the mothers’ pension programs, first enacted in Illinois and replicated in 48 states, territories and the District of Columbia by 1935, which created the first system of state-administered monthly cash grants to impoverished families. Mark H. Leff, *Consensus for Reform: The Mother’s-Pension Movement in the Progressive Era*, 47 SOC. SERV. REV. 397, 400–01 (1973). Historical reappraisals of these programs conclude that standards of fitness and morality were used to screen out virtually all nonwhite potential applicants. THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* 467–72 (1992) (noting that award of mothers’ pension benefits to immigrants was conditioned upon adherence to an “American” standard of behavior and child rearing). Similar practices continued under the Social Security Act, which left the states free to import from the mothers’ pension programs “such other eligibility requirements—as to means, moral character, etc.—as sees fit.” S. REP. NO. 628, 74th Cong., 1st Sess. 36 (1935); see LINDA GORDON, *PITIED, BUT NOT ENTITLED* 280–82 (1994) (commenting on the “silences” in the Social Security Act that allowed caseworkers discretion to import their own value judgments into the awarding of assistance). State “suitable homes” requirements of the 1940’s and 1950’s perpetuated and intensified the mothers’ pension programs’ moral rigidity and racial exclusivity. WINIFRED BELL, *AID TO DEPENDENT CHILDREN* 32–39 (1965). During the

"friendly visit" in the form of the "midnight raids," a form of investigatory surveillance to catch the "man in the bed" by surprise.¹¹⁵ Vague definitions of "substitute fathers" encouraged caseworkers to conduct invasive interviews in which they probed widely for the most intimate details of the mothers' personal lives.¹¹⁶ These incidents of welfare administration made application or recertification for welfare a humiliating and dehumanizing ordeal.

For only one brief period, federal welfare policy actually effectuated ideal theory. From 1968 through 1973, the Department of Health, Education, and Welfare (HEW) experimented in test jurisdictions with the use of a "declaration method," the acceptance at face value of an applicant's statements.¹¹⁷ The method required external corroboration of the applicant's or recipient's statements only when they were "incomplete, unclear, or inconsistent," and then only with the consent of the applicant or recipient.¹¹⁸ Contemporaneous proposals to safeguard privacy rights in the application process also reinforced the emphasis on placing faith in the applicant's credibility.¹¹⁹

During the second term of the Nixon Administration, the official articulation of a new policy blamed the declaration method for a purported increase in fraudulently claimed, and erroneously conferred, welfare benefits.¹²⁰ The Administration deliberately eliminated many of the protections of the applicant's or recipient's convenience and confidentiality that had been afforded under the declaration approach. Applicants could no longer phone in applications; they had to deliver statements signed under oath, to the welfare office in person.¹²¹ The detailed cautions to the applicant of what

same period, state and local legislatures erected eligibility screens against unwed mothers and "substitute parents," males who by their real or rumored presence were presumed to be contributing income to the fatherless children. *Id.* at 76-92. Implementation of substitute parent and suitable home policies by social service workers barred many black applicants from assistance. *Id.* at 130-32.

115. For an analysis of the District of Columbia's "Special Investigation Project," one "midnight raid" program that deployed inspectors to reinvestigate homes in which workers had suspected but been unable to prove the unreported presence of a male in the household, see Winifred Bell, *The "Rights" of the Poor: Welfare Witch-Hunts in the District of Columbia*, 13 SOC. WORK. 60 (1968); see also Charles A. Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1347 (1963); Note, *Rehabilitation, Investigation and the Welfare Home Visit*, 79 YALE L.J. 746 (1970).

116. Testimony taken in *King v. Smith* illustrates how the indeterminacy of the standards for evidence of a "substitute father" relationship provoked wildly invasive interrogations. Commissioner King thought that proof of weekly sex was sufficient indication of the presence of a substitute father relationship; two directors of county welfare departments thought that once every three months, or once every six months, would be enough. Other directors depended on their investigating caseworkers to ask whatever questions were necessary to elicit proof of the nature of the relationship. Brief for Appellees at 14-16, *King v. Smith*, 392 U.S. 309 (1968) (No. 67-949).

117. See 33 Fed. Reg. 17,189 (1968) (proposed Nov. 8, 1968).

118. *Id.*

119. See 35 Fed. Reg. 8784, 8785 (1970) (emphasizing that applicants' statements would be primary source of information about eligibility, that agency would help applicants or recipients secure any additional required information and be responsible for securing it if individual was incapable of doing so, and that verification of eligibility would be limited to "reasonably necessary" verification).

120. See 38 Fed. Reg. 22,005, 22,006 (1973).

121. See *id.* at 9821.

information could or could not be sought from third parties, always with the applicant's permission, were gone, supplanted by a terse directive to give applicants information about eligibility criteria and recipients' obligations.¹²² The new rules sanctioned greater hardship to the applicant in the form of greater delay: The original thirty-day period within which the state welfare agency had to determine an applicant's eligibility was extended to forty-five days, explicitly to accommodate the more onerous verification procedures that the new quality control standards would pressure states to adopt.¹²³ In justifying the most damaging change—the substitution of a bland reference to constitutional and statutory protections for the elaborate prohibitions on excesses in agency investigations of recipients' personal lives—HEW dismissed critics' concerns about intrusions upon privacy as subordinate to the greater goal: "In order to perform a proper job of eligibility determination, and to avoid penalties for inaccuracy, agencies need to develop, within constitutional constraints, new methods of eligibility determination. Verifications are for the protection of the truly needy, and to restore faith in the welfare system."¹²⁴

These regulatory reversals in AFDC reinforced "coming into the house" as a device for the control of the beneficiary population. As the OESSS waiting room stories have shown, the face-to-face meeting requirement of modern-day welfare administration recalls the intrusiveness of the home visits earlier in this century. The individual social worker, rather than the recipient, controls the encounter. Technically, workers are forbidden from using verification of eligibility as a pretense to preclude persons from applying.¹²⁵ Yet, federal guidelines support intake workers in their demand for presence; and the vagueness of the remaining regulatory scheme leaves room for them to demand other extraordinary forms of proof. Rather than empower the recipient by giving her an independent voice, the face-to-face meeting in a preapplication setting often allows individual workers to give sway to their own values and psychological responses with impunity. An applicant's ability to produce birth certificates in person, on demand, demonstrates to the worker aspirations to middle-class respectability every bit as reassuring as the ability to show a closet empty of men's shoes.¹²⁶

122. See *id.* at 22,009. 45 C.F.R. § 206.10(a)(12) (1972), which had required a series of elaborate notices to the applicant of why certain information was required, and of her right to have any investigations of eligibility discontinued, was eliminated. The new regulation gutted § 206.10(a)(10) by shortening its lengthy recitation of prohibited investigatory practices to a mere prohibition "against entering or searching a home illegally." 38 Fed. Reg. 9821 (1973).

123. See 38 Fed. Reg. 22,005, 22,006 (1973) (describing discourse concerning the proposal to extend time limit from 30 to 45 days); *id.* at 22,009 (extending time limit to 45 days).

124. *Id.* at 22,007.

125. See 45 C.F.R. § 233.10(a)(1)(vi) (1992) (instructing states not to use eligibility criteria or verification procedures to prevent applicants from applying); *id.* § 233.10(a)(1)(vii) (requiring application of verification procedures "consistent with the objective of assisting all eligible persons to qualify").

126. I am indebted to Peter Jaszi for amplifying this point. In ruling that the Illinois Department of

2. "Credibility Criteria" and Distancing from the Personal Encounter

The discretion given to line workers enables them to force applicants to satisfy what I call "credibility criteria"—the forms of proof acceptable to support eligibility criteria. While eligibility criteria are the concrete requirements that express the community's values and serve a variety of political goals,¹²⁷ credibility criteria serve the individual worker's need to dispense benefits based on a system of values. The actual physical forms of proof demanded from applicants for benefits, and the degree of credibility accorded to them, reflect the worker's cultural assumptions about the poor and society's obligation to assist them.

The worker's adoption of credibility criteria may be motivated, metaphorically and literally, by fear of "being spare-changed." The overwhelming fear of being fooled by a panhandler's solicitation has become a constant of urban life. In the individual exchange, where the vulnerability of the requester and of the prospective giver are equal, fear of being defrauded is a protective reaction.¹²⁸ Out of the moral confusion comes a desperate need to ascertain whether the protestations of need are true and to control the use of our token donation.¹²⁹ The reaction encompasses, and is greater than, visceral categorizations of the poor into the "deserving" and "undeserving." The same reflex drives the administration of public welfare benefits. These conflicts play themselves out at every level of welfare administration, from policy setting to delivery. They are at their most powerful at the level of the line worker, who must cope with her own reactions without a strong administrative check on those responses, but with strong historical and institutional endorsements of them.

Public Aid used arbitrary criteria to terminate AFDC recipients from the program based on their alleged failure to cooperate with paternity investigations, one court noted expert social worker testimony to the effect that middle-class social workers often assumed norms of what information would be reasonable to expect clients to volunteer, and then assumed dissembling or withholding if the clients failed to meet the intake workers' personal criteria. *Doston v. Duffy*, 732 F. Supp. 857, 864, 871 (N.D. Ill. 1988).

127. Handler and Hasenfeld have associated the mechanisms for proving eligibility for public benefits with "myths and ceremonies" that affirm cultural norms distinguishing the deserving from the undeserving poor. JOEL F. HANDLER & YEHESEKEL HASENFELD, *THE MORAL CONSTRUCTION OF POVERTY: WELFARE REFORM IN AMERICA* 11 (1991).

128. Several commentators have explored the visceral, personal reactions of the panhandler to the panhandler. See, e.g., Michael M. Burns, *Fearing the Mirror: Responding to Beggars in a "Kinder and Gentler" America*, 19 HASTINGS CONST. L.Q. 783, 803 (1992) (contending that one's sense of personal stability, more than race, gender, or class, dictates giving behavior); Jeff Lyon, *Social Change: Negotiating the Mine Field (and Mind Field) of Urban Want*, CHI. TRIB., May 30, 1993, Magazine at 10, 17 (recounting how one lawyer reached decision to forget his fears of being conned and to give money to anyone who asked him); Anna Quindlen, *The Panhandler: The Heart Wants To Give, but the Head Hesitates*, N.Y. TIMES, July 7, 1988, at C2 (recounting how mother begging for her blond child temporarily allayed distrust of Fifth Avenue passers-by).

129. For one reaction, see Nicholas Dawidoff, *To Give or Not To Give*, N.Y. TIMES, Apr. 24, 1994, § 6 (Magazine), at 34, 52 (describing author's compulsion to investigate panhandlers' claims of personal misfortune).

Line eligibility workers, presumably at the behest of their superiors, continue to enforce demanding credibility criteria in programs that formally are specifically exempted from such criteria. One explanation places the blame on the bifurcation of the role of public social services caseworker into two discrete functions: (1) eligibility determination, and (2) provision of ongoing counseling and assessment of overall needs. Conflicting federal demands for fraud control and the aspiration to eliminate arbitrariness from intake processes, among other factors, prompted this development in the early 1970's.¹³⁰ Critics have claimed that the conversion of social workers into income eligibility technicians has robbed them of their sense of connection with the welfare of the clients and with the greater goals of the programs.¹³¹ As a result, caseworkers are indifferent to abuse of the application process: They fail to inform applicants of their entitlement to other benefits, and they adopt rigid hierarchies of credibility criteria for the verification of eligibility.¹³²

That intake workers have come to see themselves as ticket punchers, and not as counselors, may explain in the aggregate some of the ministerial rigidities that produce harmful results such as the effects of the churning practices discussed above. It does not fully explain the excesses of institutional behavior that manifest themselves through cruelty to individual recipients, as in Simon's example of the immigrant mother's experiences,¹³³ nor does it explain our own encounters with the intake travails of women like Tanya and Shauna. Neither the dehumanization of the intake function nor any zeal for fraud control can adequately account for the abusive treatment of welfare applicants and recipients that occurred before the federal and state bureaucratization of welfare, or explain why such treatment has persisted, as virulent as ever, even after the implementation of bureaucratic controls on worker behavior.¹³⁴ The supposed powerlessness of the intake worker in executing her narrowed function in fact transforms into control—into threshold decisions about credibility that are no less aggressive or judgmental than were the fabled midnight raids for the man under the bed.

130. See, e.g., Jan L. Hagen, *Income Maintenance Workers: Technicians or Service Providers?*, 61 SOC. SERV. REV. 261 (1987); Irving Piliavin & Alan E. Gross, *The Effects of Separation of Services and Income Maintenance on AFDC Recipients*, 51 SOC. SERV. REV. 389 (1977).

131. See, e.g., Joan Arches, *Social Structure, Burnout, and Job Satisfaction*, 36 SOC. WORK 202, 203 (1991) (pointing to compartmentalization of social worker's functions as inducing "deskilling," which in turn contributes to stress and burnout that desensitizes workers to clients).

132. See Simon, *supra* note 44, at 1206–11.

133. See *supra* text accompanying note 44.

134. Joel Handler noted that, even before the official elimination of social work functions from intake workers' jobs, many public assistance recipients did not enjoy a therapeutic or even helpful relationship with a professional social worker; rather, many public assistance recipients suffered from abusive or invasive intake practices. Joel F. Handler, *Discretion in Social Welfare: The Uneasy Position in the Rule of Law*, 92 YALE L.J. 1270, 1270–71 (1983); see also GORDON, *supra* note 114, at 295–96 (emphasizing that, from their inception, local programs under Aid to Dependent Children offered little in way of expensive casework services, but gave workers great discretion to allocate benefits).

The second theory that explains workers' personal reactions more fully, derives from what has been labeled "defensive avoidance" in the individual welfare client-welfare worker relationship. This concept takes us back to the aversion of the panhandled person to the panhandler—the adoption of whatever fantasy or rationale will work to make the encounter with desperate need bearable and comprehensible. "Defensive avoidance" has been described as a reaction—a person's feeling of uncertainty and powerlessness in the face of an acute, serious problem—and as the ensuing action—the brusque, premature adoption of a rigid course of action as a way of cutting off further distressing rumination about the problem.¹³⁵ Twenty years ago, Handler and Hollingsworth described the phenomenon as one of emotional withdrawal, in the context of the behavior of welfare caseworkers who knew that there was little they could offer the applicants for service.¹³⁶

Insisting that persons desperately in need submit onerous proof of their eligibility helps intake workers avoid troubling contact with such persons in several ways. First and most obviously, the worker may seize upon the applicant's inability to provide the documentation, and "churn" the case closed.¹³⁷ Second, the worker may substitute the distancing discussion about verification for the more substantive, and painful, discussion of the client's situation. Last, the reliance upon the pieces of paper may help shrink the human catastrophe down to a mundane, understandable size.¹³⁸

There are two perceptions of applicants for assistance that may help individual caseworkers to maintain the "defensive avoidance" or "withdrawal" reactions. One view is that persons will make themselves eligible in order to receive a benefit.¹³⁹ The condition of homelessness again provides a paradigmatic example. The purported incentive for families to attempt to qualify fraudulently as homeless is not the immediate benefit of emergency

135. Robin A. McGee, *Burnout and Professional Decision Making: An Analogue Study*, 36 J. COUNSELING PSYCHOL. 345, 345-46 (1989).

136. Joel F. Handler & Ellen Jane Hollingsworth, *Reforming Welfare: The Constraints of the Bureaucracy and the Clients*, 118 U. PA. L. REV. 1167, 1176-79 (1970).

137. For an example of precisely this sort of behavior, see Evelyn Z. Brodtkin, *The Organization of Disputes: The Bureaucratic Construction of Welfare Rights and Wrongs*, in 12 STUDIES IN LAW, POLITICS & SOCIETY 53, 67-69 (Susan S. Silbey & Austin Sarat eds., 1992) (describing how, when individual caseworkers in Illinois were required to meet quotas for moving AFDC recipients from welfare to work, but were given no guidelines and no resources for translating the clients' career ambitions into available jobs or programs, they responded by cutting recipients off for, among other things, failure to keep appointments, resulting in the disqualification of 43,470 out of 101,000 recipients of AFDC and general fiscal assistance in 1986).

138. For analyses of how immigration judges and others refuse to take notice of the full cultural and historical context of refugees' accounts of persecution and, in doing so, distance themselves from the horror of the refugees' narratives, see Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433, 516-27 (1992); Peter Margulies, *Difference and Distrust in Asylum Law: Haitian and Holocaust Refugee Narratives*, 6 ST. THOMAS L. REV. 135, 144-47 (1993).

139. Cf. CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980* (1984) (positing that distribution of benefits induces behavior that will qualify recipients for benefits).

shelter, but the longer-term benefit of permanent housing, to which emergency shelter has become the only sure and quick pathway.¹⁴⁰ As the world of poor persons seeking benefits splits into the deserving and undeserving, or the blameless and the self-inflicting, so here the result is to divide the world of persons seeking shelter into the truly and not truly homeless.

The second perception depends on theories that explain homelessness as rooted in the personal incapacity of the individual homeless person. More than implied in that position is the belief that homelessness results from dysfunctionality.¹⁴¹ As at least one commentator has suggested, if people are believed to be homeless because they are mentally ill or are substance abusers, then homelessness can be viewed as rooted in individual aberration and not in the economic structure.¹⁴² This perception differs subtly from that which makes possible the categorization of homeless people as truly or falsely homeless. The notion that some render themselves homeless to get housing tacitly admits the presence of an underlying systemic problem—the lack of affordable housing—just as the conviction that some “pauperize” themselves to qualify for welfare benefits admits the structural scarcity of unskilled jobs with medical benefits. But while many may believe that the victims of substance dependency, and even of mental illness, have also “brought it on themselves,” that conviction need not rest on any understanding of broad economic inequities. Both of these beliefs about the origins of homelessness allow the housed person—the eligibility worker, the legislator, the individual

140. Public housing authorities must reserve at least 50% of units that become vacant for families occupying substandard housing, a group that includes homeless families. 42 U.S.C. § 1437d(c)(4)(A)(i) (1994). The statutory requirement makes this usually implausible claim somewhat more plausible. See generally Stanley S. Herr & Stephen M.B. Pincus, *A Way To Go Home: Supportive Housing and Housing Assistance Preferences for the Homeless*, 23 STETSON L. REV. 345 (1994). Apart from attempting to fathom the motive for seeking shelter from asking the applicants themselves, there is no way to prove this thesis except by inferring a basis from aggregate statistics. One commentator has noted that, while in 1990 Philadelphia reduced its shelter population by transferring homeless families into permanent housing, the influx of two hundred new families into the shelter system every month indicated that this policy had not reduced the city's homeless population. Dennis P. Culhane, *The Quandaries of Shelter Reform: An Appraisal of Efforts To “Manage” Homelessness*, 67 SOC. SERV. REV. 428, 432 (1992). One could conclude from these data either that families were “making” themselves newly homeless in order to qualify for the precious housing benefit, or that there were in fact far more homeless families than anyone had assumed.

141. See ALICE S. BAUM & DONALD W. BURNES, *A NATION IN DENIAL* 110–31 (1993) (claiming that some advocates have prevented consideration of effective remedies for homelessness by denying that homelessness originates in disability and dysfunctionality); cf. Gary Blasi, *And We Are Not Seen: Ideological and Political Barriers to Understanding Homelessness*, 37 AM. BEHAV. SCIENTIST 563, 580–81 (1994) (linking focus of research on individual psychological determinants of homelessness to availability of funds for mental health research, as opposed to research on availability of affordable housing).

142. See Michael L. Perlman, *Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization*, 28 HOUS. L. REV. 63, 80 (1991) (referring to “medicalization” of social problems generally); David A. Snow et al., *The Myth of Pervasive Mental Illness Among the Homeless*, 33 SOC. PROBS. 407, 420 (1986) (describing depoliticization of homelessness as one result of its “medicalization”). For the view that the focus on the plight of individual homeless families has contributed to a perception of them as personally pathological rather than as sympathetic, see Francine H. Jacobs, *Defining a Social Problem: The Case of Family Homelessness*, 37 AM. BEHAV. SCIENTIST 396, 400 (1994); Lucie White, *Representing “The Real Deal”*, 45 U. MIAMI L. REV. 271, 294–95 (1990–91).

with no involvement in the lives of the destitute—to disclaim responsibility for the plight of homeless persons, and to do so without guilt.

B. *The Pressures on, and Through, the System*

The practices of welfare administration that prove to be most conclusively disempowering consist of “neutral operations,”¹⁴³ the mechanical structuring and staffing of offices that keep poor people from filing applications for assistance. “Neutral operations” consist essentially of both the reflexive and calculated responses of the ground-level welfare office management and staff to circumstances beyond their control. These circumstances include anything that pushes workloads to physically and psychologically unmanageable levels: increased demand by more clients for more services, increased demand by the legislature and executive for more recordkeeping, and decreased resources of staff, space, and time with which to cope with all of the above. The responses range from the most visible—the closing off of intake—to the least—the failure of the individual worker to return a potential applicant’s phone call.

1. *The Pressures of Formal Accountability*

a. *The Pressure To Deter Before Rights Attach: The Point of Application as the Trigger for Accountability*

The federal AFDC program provides the basis for the emphasis on the right of the applicant for benefits to immediate attention. The federal statute stresses the importance of opening up the process for AFDC applicants from the beginning: “[A]ll individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and . . . aid to families with dependent children shall . . . be furnished with reasonable promptness to all eligible individuals. . . .”¹⁴⁴

The AFDC regulations obligate welfare offices to allow individuals to apply “without delay”;¹⁴⁵ the emergency assistance program for families, an adjunct to AFDC, requires not only the delivery of aid “forthwith,”¹⁴⁶ but twenty-four-hour, seven-day-a-week access to emergency services.¹⁴⁷ Other benefits programs similarly emphasize the importance of allowing applicants

143. Blasi, *supra* note 5, at 593.

144. 42 U.S.C. § 602(a)(10)(A) (1988).

145. 45 C.F.R. § 206.10(a)(1) (1993).

146. *Id.* § 233.120(a)(5).

147. *Id.* § 206.10(a)(5)(i).

to file their applications upon their first moment of contact with the welfare bureaucracy.¹⁴⁸

Allowing applicants to apply seems to be a rather self-evident proposition. In fact, however, early in the history of the Social Security Act, the discouragement of applications was an accepted bureaucratic strategy to limit costs and exclude undesirables. To avoid incurring expenditures for Old Age Assistance, some states put senior citizens on waiting lists, and only moved them up on the list once a current recipient died—truly the ultimate device for capping benefits in an uncapped entitlement program.¹⁴⁹ In the administration of Title IV-A, the Aid to Dependent Children section of the Act, intake workers in some localities coped with political pressures to screen out African-American families as “unsuitable” by treating requests for applications as mere “inquiries,” to be ignored, and also by putting families on waiting lists to file applications.¹⁵⁰ The 1950 amendments to the Act emphasized the importance of serving all applicants equitably by extending to applicants the same rights of redress through fair hearings that the 1935 Act had provided to recipients.¹⁵¹

The pivotal role of application in the formal welfare scheme creates incentives for offices—and thus for individual workers—to prevent applications from being filed. Bureaucratic action that deflects claims for assistance before they can take the form of application is critical, because the point of application is the critical moment in all federal benefits programs. It starts the clock running on processing time: Program regulations set specific deadlines for processing for AFDC,¹⁵² food stamps,¹⁵³ and medical

148. See 7 C.F.R. § 273.2(c)(1) (1994) (noting that households applying for food stamps have right to file applications during office hours on same day on which they contact food stamp office).

149. The House Ways and Means Committee's report on H.R. 6000, the Social Security Act Amendments of 1949, noted that some agencies had stopped taking applications where their jurisdictions provided too little money for all eligible persons, and described the other practices as follows: “Applicants who have already been found eligible are kept waiting for assistance until persons on the rolls die or cease to receive assistance for other reasons.” H.R. REP. NO. 1300, 81st Cong., 1st Sess. 43 (1949). The report decried these deterrents to assistance: “In a program supported from public funds such discrimination is unjustifiable. Available funds should be used for the benefit of all persons who meet the conditions of eligibility, even if the amount of assistance granted to those already on the rolls must be reduced.” *Id.* The committee also found that the practice was in effect in the dependent children's program. *Id.* at 48.

150. See BELL, *supra* note 114, at 42–45.

151. The Senate Finance Committee's report on H.R. 6000, the Social Security Act Amendments of 1950, noted that states would have to amend their state plans to specify that “all individuals wishing to make application for assistance shall have an opportunity to do so and that assistance shall be furnished with reasonable promptness to all eligible individuals.” S. REP. NO. 1669, 81st Cong., 2d Sess. 170–71 (1950). It also extended this requirement to Title IV-A, the AFDC program. The report also noted that the Senate version changed the House's “promptly” to “with reasonable promptness.” *Id.*; see 96 CONG. REC. 12,610, 12,633 (1950). For a discussion of the history of the “opportunity to apply” and “reasonable promptness” provisions in the context of how Maryland succeeded in curtailing its AFDC expenditures for large families, see *Dandridge v. Williams*, 397 U.S. 471, 493–99 (1970) (Douglas, J., dissenting).

152. State agencies are supposed to issue decisions on eligibility for AFDC within 45 days of the date of application. 45 C.F.R. § 206.10(a)(3)(i) (1994).

153. Decisions on eligibility for regular, nonexpedited issuance of food stamps must be made within 30 days from the date of application. 7 C.F.R. § 273.2(g) (1994).

assistance,¹⁵⁴ and delays in processing are recorded as specific case events.¹⁵⁵ If the applicant proves herself to be eligible, the filing of the application defines the point in time from which payment of benefits begins.¹⁵⁶ Program regulations also prohibit the agency from allowing processing procedures to delay delivery of benefits,¹⁵⁷ and require state agencies to maintain individual case files with records of dates of application and disposition, and of reasons for the disposition.¹⁵⁸ Finally, under statutory and regulatory provisions of federal benefits programs, it is clear that applicants for assistance, as well as recipients, are entitled to fair hearings to challenge explicit denials.¹⁵⁹ In short, any strategy is attractive that cuts off the client influx before it triggers the events for which welfare departments become statistically accountable.

b. *The Pressure To Satisfy External Monitoring: Quality Control and Other Inducements to Verification Extremism*

Of the three insatiable external demands with which welfare offices cope through "neutral," internal adjustments, external demands for fraud control

154. Medicaid applications must be decided within 90 days for persons applying jointly for Medicaid on the basis of disability, and 45 days for all other Medicaid applicants. 42 C.F.R. § 435.911(a)(1)-(2) (1994).

155. See, e.g., OFFICE OF FAMILY ASSISTANCE, *supra* note 66, at 119 tbl. 83 (listing data received from the states and published quarterly on numbers of AFDC applications for which processing time exceeds the regulatory 45-day limit).

156. See, e.g., 45 C.F.R. § 206.10(a)(6)(C) (AFDC); 7 C.F.R. § 273.2(a)(vii) (requiring that food stamp application form contain notification that benefits for successful applicants start from application date).

157. State plans under the AFDC program must specify that eligible individuals will receive "financial assistance and medical care and services . . . without any delay attributable to the agency's administrative process." 45 C.F.R. § 206.10(a)(5)(i). Medicaid prohibits the state agency from waiting until the deadlines expire before determining eligibility, or from denying applications because the agency has failed to determine eligibility within the deadlines. 42 C.F.R. § 435.911(e)(1)-(2). In contrast, the food stamp regulations explicitly accommodate delays in reviewing applications. Processing delays are divided into those caused by the household and those caused by the agency. For those caused by the household, the agency shall give the household another 30 days from the 30-day application processing deadline, unless verification is lacking, in which case the state agency has the option of beginning the extra 30-day grace period from the date of the initial request for information. 7 C.F.R. § 273.2(h)(2)(i). For delays caused by the agency, the only remedy is certification of benefits back to the month of application. *Id.* § 273.2(h)(3). The regulations deal with agency-caused delays in excess of 60 days simply by requiring the agency to continue to process the applications and ultimately to give retroactive benefits if the household proves to be eligible. *Id.* § 273.2(h)(4). It seems clear that, by using the 30-day deadline as the starting point for calculating delay, the food stamp regulations implicitly accept and incorporate the practice of treating the 30-day deadline as the starting point to *begin* to review applications.

158. 45 C.F.R. § 205.60 prescribes the information to be retained concerning application and disposition dates on individual case records for AFDC. Persons who apply for AFDC should be allowed to apply simultaneously for food stamps. 7 C.F.R. § 273.2(j)(1). The applicant has one case file and the recordkeeping requirements of 45 C.F.R. should apply, although, as noted earlier, the time limits for the expedited and the regular food stamp programs are more stringent. Similarly, the Medicaid program prohibits agencies from requiring separate application forms for AFDC recipients, 42 C.F.R. § 435.909, and requires agencies to document any reasons for a delay of decision in the applicant's case record, *id.* § 435.911(d).

159. See 42 U.S.C. § 602(a)(4) (1988) (prescribing right to fair hearing); 45 C.F.R. § 205.10(a).

measures are the most disruptive. Responses to these demands can result in verification extremism. As we have seen, verification extremism preempts application at the level of the personal encounter, where it expresses the skepticism and blunts the feelings of the individual intake worker. At the level of the welfare office, verification extremism produces system failure. Intake workers slow down their processing under the weight of the increased documentation; slowdowns in turn lead to other, subsidiary forms of discouragement, such as long lines and indeterminate waits; and, at the extreme, whole offices shut down intake to enable workers to catch up on the accumulated paperwork that verification extremism generates.

Most observers of disentanglement strategies have emphasized the critical part played by excessive demands for verification of eligibility, most notably in the context of the fallout from local administrative responses to "quality control."¹⁶⁰ Historical and political pressures make this one external demand inelastic. "Quality control" refers collectively to a series of explicit, specific federal directives issued over the past twenty years to reduce the rate of benefits paid out to ineligible recipients.¹⁶¹

The Nixon Administration changed the purpose of "quality control" from one of checking the accuracy of caseworkers' determinations to one of punishing the issuance of benefits to ineligible recipients. A perception of emergency, of state administrative systems collapsing under the weight of rapidly increasing caseloads, fueled the new approach.¹⁶² For the first time, HEW demanded a repayment of a portion of federal reimbursements issued for the states' payments to ineligible recipients and for their overpayments to eligible recipients.¹⁶³ The new "quality control" did not penalize states for

160. See generally EVELYN Z. BRODKIN, *THE FALSE PROMISE OF ADMINISTRATIVE REFORM* 78-100 (1986) (describing the "street-level" implementation of directives to reduce erroneous overpayment rates); Brodtkin & Lipsky, *supra* note 63, at 1; Lipsky, *supra* note 5, at 13; Jerry L. Mashaw, *The Management Side of Due Process*, 59 CORNELL L. REV. 772, 807 (1974) (criticizing Nixonian "quality control" program's emphasis on overpayment errors as overlooking serious management issues concerning quality of delivery of services).

161. See Casey & Mannix, *supra* note 6, at 1381-82.

162. In order to institute the new quality control regime by January 1, 1973, HEW cited the danger of "delay in implementing urgently needed measures, found to be necessary for the proper and efficient administration of the assistance programs" to justify reducing the comment period for the proposed regulations from 30 to 20 days. 37 Fed. Reg. 25,853 (1972). HEW proposed to withhold federal financial participation for "payments for ineligible cases or overpayments for eligible cases." *Id.* at 25,854. Subsequently HEW extended the comment deadline to January 15, 1973, and the effective date to April 1, 1973. *Id.* at 27,636-37.

163. A new regulation formulated two error rates: a standard for the individual state error rate, to be set at each state's rate of erroneous payments from April 1, 1973, to September 30, 1973; and a 3% national error rate. Of payments to ineligible recipients made between January 1 and July 1, 1974, states would be required to repay one-third of the difference between their error rate and the standard rate; for erroneous payments made for the next six months, two-thirds of the difference; for erroneous payments made for the next six months, all of the difference. The national error rate for overpayments to eligible recipients was set at 5%, with a similar computation. See 38 Fed. Reg. 8743, 8744 (1973).

denying benefits to eligible applicants, or for paying recipients too little. Such mistakes were simply never mentioned as part of the calculus of error.¹⁶⁴

Experience showed the regime of quality control review to be ineffectual at reducing error rates significantly below six percent.¹⁶⁵ Between 1986 and 1990 Congress liberalized the rates, included underpayments in the calculation of error,¹⁶⁶ and forgave as uncollectible the huge repayments owed by the states of federal funds disbursed for erroneously issued benefits.¹⁶⁷ But for what little "quality control" ultimately did to curtail fraud or waste, there is no question but that pressures to cut the "erroneous issuance rate," combined with other structural changes in welfare administration, produced unofficial local practices that forced recipients off the welfare rolls.¹⁶⁸

The paperwork engendered by the real and perceived demands for ever-greater verification of clients' eligibility exacerbates workloads and detracts from client service. Yet this is a self-inflicted wound. Even where verification requirements are optional, as is clearly the case with emergency benefits systems,¹⁶⁹ few welfare administrators look to relaxation of those

164. *Id.*

165. Casey & Mannix, *supra* note 6, at 1384. From the instantiation of quality control in 1973 to 1980, the national overpayment error rate for AFDC improved significantly, from about 16% to about 8%. *Id.* But massive state expenditures, estimated at a fifth of the state funds spent on AFDC, have failed to reduce the rate further. *Id.* Overpayment error rates for AFDC have fluctuated far less since 1980, dipping as low as 5.7% in 1984, rising to 7.1% in 1986, and resting at 6.0% in 1990. For food stamps, the error rate for the last decade peaked at 10.5% in 1981, and decreased to 7.3% in 1989-90. HOUSE COMM. ON WAYS AND MEANS, 103d CONG., 1st SESS., OVERVIEW OF ENTITLEMENT PROGRAMS: 1993 GREEN BOOK 1596 (Comm. Print 1993) [hereinafter 1993 GREEN BOOK].

166. As part of the Omnibus Budget Reconciliation Act of 1989, Congress substituted a national average AFDC error rate for the flat 3% tolerance. For the first time, it included underpayment rates in the calculation of the state error rate. 42 U.S.C. § 608(d)-(f) (Supp. V 1993); see also 57 Fed. Reg. 46,782, 46,804 (1992) (to be codified at 45 C.F.R. § 205.40). In recognition of the infeasibility of the 5% food stamp error rate, Congress substituted a national average payment error rate, which included underissuances of food stamps as well as overissuances and was set at 1% above the lowest rate ever achieved. By these calculations, the national average payment error rate for 1989 was set at 10.8%. 1993 GREEN BOOK, *supra* note 165, at 1588-89.

167. By 1989, every state except Nevada owed repayment to HHS for AFDC overpayments in excess of the 3% error standard, for a total of \$1.2 billion misspent between 1981 and 1986. H.R. REP. NO. 386, 101st Cong., 1st Sess. 927 (1989), reprinted in 1989 U.S.C.C.A.N. 3530. Congress imposed two moratoria on collection of the overpayments, the second expiring in July 1989. In 1990, Congress forgave the large penalties left uncollected from the states for their erroneous issuances in the food stamp program from 1983 to 1985. See Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-24, 104 Stat. 3359.

168. For a discussion of "churning" as a local, almost reflexive reaction to the prospect of federal fiscal sanctions under quality control, see Dehavenon, *supra* note 91, at 245-50; see also New York State Dep't of Social Servs., Administrative Directive to Commissioners of Social Services (93 ADM-29), Documentation and Verification Requirements for the Medical Assistance Program 2 (Sept. 21, 1993) (noting that "[t]he incidences of excessive documentation, caused by fear of eligibility errors, have become unnecessarily burdensome for both districts and [applicants/recipients]").

169. Observers of the District of Columbia's emergency food stamp delivery system have described as maladaptive, illegal, and unnecessary the internal management practice of subjecting applicants for expedited service to the full range of verification requirements, and have identified the verification requirements as the source of all major processing delays. See Food & Nutrition Serv., Review of Expedited Processing of Food Stamps Conducted by FNS at Four Centers in Washington D.C. at 1 [hereinafter FNS Review], in Report and Recommendations of the Special Master, Franklin v. Kelly, Civ. Action No. 90-3124 (D.D.C. Nov. 12, 1992); see also Franklin Special Master's Report, *supra* note 37, at 7, 21.

requirements as a way to ease the strain.¹⁷⁰

A reporter's recent interviews with management and line personnel in a front-line Baltimore City welfare office illustrate how, through systemic verification demands, even unexceptionable, routine management can lead to disentanglements. Sixty staff members oversee seven thousand cases and sixteen hundred people are interviewed for new or continuing cases each month. Nothing suggests that the staff is other than patient and conscientious. But the office stocks an inventory of 160 forms, which workers may have to fill out themselves or assist applicants or recipients in completing. A recently revised, "simplified" AFDC application is fourteen pages long, down from twenty. Filling out forms, gathering information, and explaining the forms as well as the programs' many different requirements may expand initial intake interviews to as long as an hour, with one worker able to complete six or seven interviews a day at best. Management cannot authorize overtime either to schedule more interviews or to allow interviewers to complete their own extensive follow-up paperwork. The reporter compares the consequences of the verification requirements to cholesterol clogs: Clients wait up to five or six hours in the waiting room to be seen, and the office closes one day a week so that employees can catch up on paperwork.¹⁷¹

This example illustrates one typical neutral operation—shutdown of intake—adopted deliberately as a management technique necessary to cope with the externally generated burdens of quality control and increased client demand. Workers in Baltimore City must trade off between two federally imposed requirements: that applications be processed promptly and that persons who have already applied be investigated extensively. The obvious way out of this conflict is to discourage applications.

170. In their survey of March–April 1991 of executives of state welfare departments, the American Public Welfare Association and the Maryland Department of Human Resources found that, of the several expedients open to them to reduce their paperwork load, departments were least likely to choose that of eliminating optional criteria for verification of eligibility. Of the 49 respondents (48 plus the District of Columbia), 30 had tried shortening applications and eliminating certain application forms, 32 had reassigned staff to cover intake positions, 32 were conducting fewer individual interviews, and 19 were using less stringent standards for verifying eligibility. AMERICAN PUB. WELFARE ASS'N, *MANAGING NEED: STRATEGIES FOR SERVING POOR FAMILIES* 14 (1991).

171. Laura Lippman, *Welfare Applicants Awash in a Sea of Paper*, BALTIMORE SUN, July 21, 1993, at B1.

2. *The Pressures of Informal External Demands*

a. *The Increase in Intensity of Client Demand: More Need, More Expectations*

The number of recipients of AFDC benefits has nearly doubled in the last twenty-five years;¹⁷² food stamp applications in the District of Columbia have risen precipitously in the last two years. More important than the absolute growth is the kind of application that has increased: Applications for expedited service constituted as much as seventy to eighty percent of the demand.¹⁷³ That applications for expedited service represent so high a proportion of the District's food stamp caseload has significant implications for workload pressures. It is no coincidence that, confronted by an increase in high-pressure cases and smaller staff sizes, food stamp centers shut down intake, and individual caseworkers deny some clients eligibility for emergency benefits, and subject others to extralegal verification requirements.

Almost paradoxically, demand for emergency services heightens scrutiny and slows down delivery. Operational slowdowns help caseworkers and administrators adapt to, and therefore actually alter, systems disabled from delivering the benefit as originally conceived.¹⁷⁴ Again, while these reactions appear neutral and adaptive to outside pressures, they may in fact issue from policy. The most dramatic example of such delivery slowdowns in the context of the provision of shelter services to homeless families occurred in New York, where city officials earned multiple contempt citations for allowing families to sleep in shelter intake offices overnight, rather than placing them in shelter beds or permanent housing units.¹⁷⁵ For the single Emergency Assistance Unit, sheltering homeless families on plastic chairs in the office waiting room was a neutral expedient for coping with overwhelming demand. At the

172. See STAFF OF HOUSE COMM. ON WAYS AND MEANS, 103D CONG., 2D SESS. OVERVIEW OF ENTITLEMENT PROGRAMS, 1994 GREEN BOOK 395 tbl. 10-24 (Comm. Print 1994); see also *id.* at 778-79 tbl. 18-10 (noting nearly 50% increase in food stamp recipients from 1975 to 1992).

173. Franklin Special Master's Report, *supra* note 37, at 48.

174. Observers of welfare policymaking have described how other parts of social services systems adapt when the power to control social spending shifts from one institutional actor to another. Donna Kirchheimer describes how middle management of social programs may be left to scramble without guidance for appropriate responses when legislatures, usually responsible for fiscal outlay, pass budgetary legislation or when the executive, normally responsible for implementation of social policy, makes administrative decisions that profoundly affect fiscal policy. Donna Wilson Kirchheimer, *Control of Social Spending: Gates and Gatekeepers*, 49 PUB. ADMIN. REV. 353, 356 (1989).

175. See *Lamboy v. Gross*, 493 N.Y.S.2d 709, 716 (Sup. Ct. 1985) (noting that respondent New York Human Resources Administration sheltered homeless applicants in welfare offices, known as Emergency Assistance Units (EAUs), where they slept on "formica tables under fluorescent lights with inadequate food or bathing facilities," violating state administrative directive to provide emergency shelter "immediately"). When this practice continued, a judge found the city and four city officials to be in civil contempt, and ordered the officials to spend the night at EAUs until all the families waiting to be sheltered had been placed. The appellate court affirmed the contempt finding, but vacated the sanction against the individual defendants. *McCain v. Dinkins*, 601 N.Y.S.2d 271 (App. Div. 1993), *aff'd*, 639 N.E.2d 1132 (N.Y. 1994).

policymaking level, the expedient "solution" pointed to the realities of a system that, in theory, guaranteed shelter for all.¹⁷⁶

b. *The Decrease in Resources*

The state agencies that manage welfare offices have some control over the impact of quality control standards, yet refrain from exercising it. They have no control, nor do their employees, over the externalities resulting from reductions in their administrative budgets. Lipsky has noted one method of effectuating bureaucratic disentanglement: State legislatures passively erode AFDC benefits by failing to raise them year after year.¹⁷⁷ Passive reductions in cash outlays to recipients may also reduce payments to localities for administrative expenses. Federal reimbursements to states for administrative costs are pegged at half of what the states actually pay, not half of what they would need to pay to provide timely and comprehensive service.¹⁷⁸ If state expenditures for administration remain stagnant, so does federal reimbursement. For administrative costs that federal funding does not cover, these offices and caseworkers are subject to the vagaries of state and local funding. Some states pay different percentages of local administrative costs, with their localities picking up the rest of the tab.¹⁷⁹ With every conceivable political incentive to cut the visible welfare costs of benefits, state and local governments have every reason to save money by cutting the publicly invisible costs of welfare administration.¹⁸⁰

The increases in demands for service have exacerbated the effects of the covert reduction in administrative support. A 1991 survey of social service administrations in forty-nine states and Washington, D.C., conducted by the American Public Welfare Association, found that virtually all had experienced some increase in monthly caseloads since fiscal year 1989. Nineteen states had experienced central staff reductions, six had cut local administrative staff, and

176. See *Callahan v. Carey*, N.Y. L.J., Dec. 11, 1979, at 10 (N.Y. Sup. Ct. Dec. 5, 1979) (granting preliminary injunction inferring right to shelter from interpretation of Article XVII of the New York Constitution, which guarantees to destitute residents right to subsistence).

177. Lipsky, *supra* note 5, at 10–11. As adjusted for inflation, the average value of AFDC benefits declined 43% from 1970 to 1992. The diminution can primarily be attributed not to active budget cutting, but to long periods without increases. CENTER ON BUDGET & POLICY PRIORITIES & CTR. FOR THE STUDY OF THE STATES, *THE STATES AND THE POOR* 11–12 (1993) [hereinafter *STATES AND THE POOR*].

178. The federal government reimburses states at a basic rate of 50% of their outlay for the administrative expenses of the food stamp program. 7 U.S.C. § 2025(a) (1988); 7 C.F.R. § 277.4(b) (1994). The federal government pays for half or more of actual AFDC benefits, and, again, for half of the cost of running AFDC programs. 42 U.S.C. § 603(a)(3) (1988); 45 C.F.R. §§ 95, 205.37(c) (1992).

179. See 1993 GREEN BOOK, *supra* note 165, at 676–77 (showing that as of October 1992, 11 states require counties to pay portions of nonfederal share of benefits, and 18 require counties to pay portions of nonfederal share of administrative expenses).

180. On the effects of rising poverty rates, vanishing federal assistance to housing, and general revenue sharing on local governments' abilities to control their budgets, see HELEN F. LADD & JOHN YINGER, *AMERICA'S AILING CITIES* (1989).

twenty-nine had job freezes in effect.¹⁸¹ This pattern continued during fiscal years 1992 and 1993.¹⁸²

Examples culled from litigation across the country show the impact of this strain on resources in individual welfare departments. In a decision confirming statewide administrative failures in every aspect of Virginia's expedited food stamp program, one court noted that the Commonwealth had twice reduced its allocation to the local agencies for their administrative costs that year; the decision estimated the shortfall at more than six hundred positions.¹⁸³ From 1989 to 1992, the number of benefits cases assigned to each Family Assistance Counselor in central Tennessee rose from 223 to 336. Either number is remarkable, but the result was a 50% increase in the number of AFDC applications whose processing was delayed beyond the forty-five-day deadline.¹⁸⁴ Plaintiffs in *Monroe County, New York*, alleged that the county executive cut 135 out of 999 social services positions and then vetoed an increase for the administrative welfare budget, despite statistics showing illegally slow processing of between 30 and 40% of pending applications.¹⁸⁵ Other examples illustrate the impact on the individual impoverished client. When the State of New Hampshire froze social services hiring in the face of a 156% increase in food stamp cases and a 98% increase in AFDC cases, sixty-nine eligible families in Laconia lost their food stamps because there were too few workers to keep track of the paperwork.¹⁸⁶ This is the whole story behind "churning": The case worker is pressed by a tradition of distrust to terminate one case when the applicant fails to submit the twenty different documents required; later the same caseworker, pressed by the weight of two hundred other cases, terminates a score of them when she loses the files.

In the face of the increase in labor-intensive applications for emergency services, management sometimes attempts to cut corners by eliminating or reassigning supervisory staff. The District of Columbia imposed a fourteen-

181. AMERICAN PUB. WELFARE ASS'N, *MANAGING NEED: STRATEGIES FOR SERVING POOR FAMILIES* app. at 2-4 (1991).

182. While 44 states reported increases in AFDC caseloads during fiscal year 1992 and the first half of fiscal year 1993, 22 states lost staff in their public assistance offices, and eight states hired more staff. STATES AND THE POOR, *supra* note 177, at 33.

183. *Robertson v. Jackson*, 766 F. Supp. 470, 475 (E.D. Va. 1991), *aff'd*, 972 F.2d 529 (4th Cir. 1992).

184. Memorandum and Order at 2, *Newsom v. Grunow*, No. 3:73-7136 (M.D. Tenn. Oct. 16, 1992); see also *Robidoux v. Celani*, 987 F.2d 931, 934 (2d. Cir. 1993) (finding that during 1990 economic recession, community organizations in Vermont received increasing numbers of requests for aid from public assistance applicants whose applications had been pending more than 30 days).

185. Class Action Complaint at 11-14, *Winston v. Schauseil*, Civ. Action No. 93-CV-6045 (W.D.N.Y. filed Jan. 29, 1993).

186. Amended and Intervenor's Complaint at 6-7, *Jones v. Gregg*, Civ. No. 91-748-L (D.N.H. filed Sept. 14, 1992). Initially, 121 families lost their food stamps, 69 of whom were later found to have been continuously eligible. There was no way of knowing how many of the remaining 52 families were actually eligible but did not contest their terminations or reapply. Plaintiffs in *Jones* also alleged that workers in the Laconia, New Hampshire, state human services office had an average caseload of 397 in November 1991, and of 343 in July 1992. *Id.* at 7.

month freeze on the filling of vacant supervisory positions and involuntary unpaid furloughs on already underpaid front-line staff.¹⁸⁷ Examples from other jurisdictions highlight reallocation of supervisory resources. In New York City, one budget-cutting proposal included a cut of almost a third of AFDC case supervisors, and a redeployment of caseworkers as supervisors who would continue to carry their existing caseloads of 175 per worker. To ease the supervisory burden, the Human Resources Administration sought to withdraw from the pool of decisions for supervisory review all denials of emergency relief, special needs allowances, and benefits due to change of circumstances; allowances would continue to be reviewed.¹⁸⁸ The proposal amounted not only to a general abdication of managerial control, but to a relinquishment of any pretext of protecting welfare recipients from processing errors that, given the volume of work, seem to be inevitable.

At the level of the beleaguered welfare office, faced with what must seem like a tidal wave of applicants and a drought in the resources to cope with them, the logical step is to tell the applicants that there will be no intake today. Offices in Pennsylvania limited hours of intake and capped the number of applications they would accept on any one day.¹⁸⁹ One office in Virginia would refuse all applications on particular days and, on the days on which it would entertain applicants, required applicants to begin lining up outside at 7:00 a.m.¹⁹⁰ At the level of the individual caseworker, faced with three hundred or more open files, the strategies for coping are less blatant but every bit as illegal: not returning applicants' phone calls and then terminating their cases for failure to keep in touch,¹⁹¹ or scheduling appointments for verification interviews weeks after the clients filed their applications.¹⁹² In

187. Franklin Special Master's Report, *supra* note 37, at 48–51.

188. See Memorandum Decision and Order at 27–28, *Brown v. Giuliani*, CV-94-2842 (E.D.N.Y. Oct. 27, 1994).

189. The court in *Harley v. Lyng* found illegal restrictions on physical access to social services offices in 25 locations across the state. One office refused to admit applicants after 9:00 a.m., another, after 2:00 p.m. 653 F. Supp. 266, 270–71 (E.D. Pa. 1986).

190. *Robertson v. Jackson*, 766 F. Supp. 470, 474 (E.D. Va. 1991).

191. In a Colorado case, Mr. and Ms. Derby and their daughter were living in emergency shelters while they awaited the results of their application for food stamps. They received their first food stamps 21 days after they applied but never received word on the progress of their application for an AFDC grant. They left several messages for their caseworker to inform her of their changing mailing addresses; they were never able to reach her directly on the phone. When Ms. Derby finally reached the caseworker, five weeks after they had applied, she was told that her case had been closed because the caseworker had been unable to locate her. Complaint at 9–10, *Darts v. Ibarra*, Civ. Action No. 91-S-1003 (D. Colo. filed 1991).

192. For example, Ms. Darts filed her application for benefits on March 29 and was given an appointment with an "eligibility technician" for 8:30 a.m. on May 9; she was told that if she were late for this appointment she would have to start all over again with a new application. *Id.* at 7. In a New York case, named plaintiff Betty Winston first applied for AFDC on October 2, 1992; when she failed to submit proof of her disqualification for unemployment benefits, her case was closed. She made an appointment for December 11 to reapply and was given another appointment for December 16 to see a worker from the unemployment unit. On December 16 the designated worker was sick, so Ms. Winston was interviewed by someone else. When Ms. Winston called on January 6, 1993, to inquire about the status of her case, she was told that it was closed because there was no record of her having kept her December 16 appointment. When the legal services organization intervened, Ms. Winston was given a new appointment for January

the District of Columbia, food stamp centers simultaneously opened for business and closed for intake at 8:30 a.m.; anyone not already in the line of seventy to eighty applicants that began forming at 6:30 a.m. was out of luck.¹⁹³ Potential applicants who do get past the front door take numbers and form a "deli line."¹⁹⁴ All of these expedients for slowing down and shutting off the caseload culminate in significant delays.¹⁹⁵ When the synergy of personal gatekeeping decisions and of demand and resource-driven managerial decisions results in an office shutdown, "neutral operations" accomplish the ultimate "defensive avoidance." If current or would-be clients cannot even come in, then personnel can avoid personal encounters entirely.

The battle-weary atmosphere of the waiting rooms is the product of the expenditure of tremendous misdirected energies: the energy that it takes to extract solid-gold proof of personal information; the energy to devise ways of saying "no" without the distress of doing so; in short, the energy required to appear to offer a value-free, openly accessible public benefits program that is in reality closed. Budget-driven personnel policies may save some money, but they take their toll in productivity, supervisory control, and worker motivation.¹⁹⁶ Short-staffing, undertraining, erratic supervision, and "deli lines" communicate to both personnel and applicants at the ground level the scant regard given to their concerns at the budget-making levels.

In analyzing patterns of governmental responses to social problems, Lipsky and Smith have described how and when governments characterize and treat social problems as "emergencies." Problems are "emergencies" when they are perceived as resolvable through quick, albeit big, fixes that do not disturb the settled consensus about the proper objects of social policy. Once the awareness dawns that the emergency is in fact chronic, budgets, energies, and expectations rarely can shift coherently.¹⁹⁷ One analogy might be to the runner who trains herself to run a five kilometer race, and finds, at the end of 5K, that she actually has entered a marathon.

With time, all the major shelter bureaucracies have adopted strategies suited to handling large, permanent welfare caseloads in an official structure formerly designed for small, temporary resolutions. We have seen examples of the ad hoc strategies. In the context of homelessness, some of the formal,

22, at which time she saw someone else because the designated worker was sick. As of January 29, 1993—almost four months after she had first applied—she had received no benefits. Class Action Complaint at 15–18, *Winston v. Schauseil*, Civ. Action No. 93-CV-6045 (W.D.N.Y. filed Jan. 29, 1993).

193. FNS Review, *supra* note 169, at 3–4.

194. Franklin Special Master's Report, *supra* note 37, at 38.

195. See, e.g., *id.* at 4 (noting that, as of October 1992, District's food stamp program was making ATP cards for expedited issuance available to applicants within five-day period in only 48.4% of its cases).

196. *Id.* at 49 (commenting that some employees projected a "poor attitude toward managers and/or clients," and recommending quick action for dismissal of employees who were "inadequate, unproductive or hostile").

197. See Lipsky & Smith, *supra* note 102, at 8–9.

open strategies involve limiting the length of shelter stay.¹⁹⁸ Some rely upon officially elevating scrutiny of eligibility, as in New York, where, in acknowledgment of the failure of the bureaucratic system to deliver "shelter on demand," the executive for the first time imposed the exaction of credibility criteria as a deliberate rather than covert gatekeeping strategy.¹⁹⁹ Some strategies simply officially absolve the system of obligations.²⁰⁰

In this Essay, I have discussed perceptions about poor people that may enable individual caseworkers to cope with the faces of extreme poverty. It should be emphasized that these perceptions, together with perceptions about the causes of poverty, also enable policymakers to justify certain decisions, and in that way they inform both the covert bureaucratic adaptations and public adoption of solutions to poverty.²⁰¹ New York's imposition of credibility criteria upon applicants for shelter services arose in part from the belief that persons who were not "legitimately homeless" were making themselves so in order to gain access to permanent housing.²⁰² Despite the absence of evidence to substantiate this view, administrators and students of policy have voiced their support for it openly.²⁰³ Similarly, the belief, held individually, that homelessness results from dysfunctionality, has translated into the idea that homeless persons need more than "just" housing or even minimal assistance in locating housing. As such, the "homelessness as aberration" theory has

198. See, e.g., *Savage v. Aronson*, 571 A.2d 696, 699 (Conn. 1990) (upholding administrative reduction from 180 to 100 days of emergency overnight shelter for families); *Franklin v. New Jersey Dep't of Human Servs.*, 543 A.2d 1, 2 (N.J. 1988) (upholding administrative limitation of five months on family shelter services).

199. See CITY OF NEW YORK, DEP'T OF HOMELESS SERVS., NON-FINANCIAL ELIGIBILITY FOR EMERGENCY HOUSING (Draft Aug. 6, 1993) (shifting burden of showing absence of housing alternatives to applicants for shelter services, and denying services to applicants who fail to cooperate with verification of homelessness).

200. See Celia W. Dugger, *Giuliani Relieved of an Obligation on the Homeless*, N.Y. TIMES, Dec. 31, 1994, at A1 (reporting that in his last act as chief executive, outgoing governor Mario Cuomo relieved New York City of its regulatory obligation to shelter homeless families immediately on demand); see also *McCain v. Dinkins*, 84 N.Y.2d 216, 221-22 (1994) (quoting partial text of 83 ADM-47, requiring local social services districts to shelter homeless families immediately upon their point of contact with social services agency).

201. See, e.g., Deborah A. Stone, *Causal Stories and the Formation of Policy Agendas*, 104 POL. SCI. Q. 281, 282 (1989) (describing role of "causal ideas" in translating "difficulties" into political problems).

202. See Alan Finder, *To Reduce Number, Dinkins Offers Rules on Who's Homeless*, N.Y. TIMES, Apr. 1, 1993, at B3; see also CITIZENS' COMM. FOR CHILDREN OF NEW YORK, INC., ON THEIR OWN—AT WHAT COST? A LOOK AT FAMILIES WHO LEAVE SHELTERS 9 (1992) (claiming that such perceptions motivated other informal approaches, such as routing families into squalid barracks-style shelters and welfare hotels to deter homeless families from using shelter as conduit to better permanent housing). But see Charisse Jones, *Small Effect Anticipated in Altered Shelter Rules*, N.Y. TIMES, Oct. 28, 1993, at B3 (citing statement by Commissioner of New York City's recently created Department of Homeless Services predicting that new screening procedures would reject no more than 40 to 60 of the 2800 families who apply for shelter in New York each month, that only "small portion of people" were using shelter process as conduit to better housing, and that most applicants were in fact homeless).

203. DEPARTMENT OF HOUS. & URBAN DEV., INTERAGENCY COUNCIL ON THE HOMELESS, OFFICE OF THE MAYOR AND AGENCIES OF THE DIST. OF COLUMBIA, THE D.C. INITIATIVE: WORKING TOGETHER TO SOLVE HOMELESSNESS 40 (1993) [hereinafter D.C. INITIATIVE]; CHRISTOPHER JENCKS, THE HOMELESS 104-05 (1994) (noting use of shelters to obtain subsidized, permanent housing).

shaped recommendations for local programs²⁰⁴ and influences the highest levels of federal policymaking.²⁰⁵ New York's adoption of credibility criteria for shelter charts the change in perception of homelessness from a pitiable emergency to a wearisome constant of life in the city.

IV. SOLUTIONS: THE ROLE OF LITIGATION IN THE MANAGEMENT OF A DIGNITARY DUE PROCESS

A. *Correcting a Culture of Disentitlement: The Difficulties of Relying on Litigation as a Management Tool*

A management consultant—not a welfare rights advocate, not a constitutional scholar—who looked in on any of the welfare waiting rooms we have vicariously visited might well be forgiven for asking, “Who’s minding the store?” Disgruntled employees, inhospitable reception areas, and mounting piles of undone paperwork do not make for an efficient operation, let alone a fair one. But a quick examination reveals not so much that the answer is, “No one,” as that no one much cares about the question. Even when “quality control” takes account of errors that penalize welfare recipients, it does not measure endless waiting, delays in processing, or abuses in verification—arguably, it encourages them. As Winifred Bell pointed out thirty years ago, poor families’ lives change so quickly that the standard methodology (then as now) for assessing accuracy of caseworkers’ eligibility determinations—the retrospective checking of the recording of facts at the time of application or recertification, from the vantage point of current facts—is doomed to fail.²⁰⁶ In short, current methods for scrutinizing welfare delivery systems do not measure what matters to poor people, and measure poorly what matters to everyone else.

All of the litigation illustrating this Essay consists of long-term struggles over the nitty-gritty of welfare administration. Advocates have attempted to

204. See *THE WAY HOME*, *supra* note 90, at 77 (concluding that most homeless families need social services for placement in permanent housing to succeed). The Commission recommended provision of social services to homeless families despite its findings that, of 501 families interviewed, most reported financial hardship, overcrowding, or unsafe housing as the primary precipitants of their homelessness. *Id.* at B-11; see also *D.C. INITIATIVE*, *supra* note 203, at 16 (recommending as essential the provision of “continuum of care model” involving outreach, “transitional rehabilitative services,” and “supportive permanent housing”). The proposal’s analysis that “[t]he problem of homelessness is exacerbated by the lack of affordable housing for both families and single individuals of low income,” *id.* at 46, underscores the core assumption that social, not economic problems, lie at the heart of the issue of homelessness. (I am indebted to the late Elliott Liebow for this last observation.)

205. See *INTERAGENCY COUNCIL ON THE HOMELESS, PRIORITY: HOME! THE FEDERAL PLAN TO BREAK THE CYCLE OF HOMELESSNESS* 35 (1994) (urging creation of “continuums of care” to address “the sources of residential instability—both structural and personal”). It should be noted that this is the first policy statement at the executive level to acknowledge homelessness in the United States as a serious problem and that also recognizes structural poverty as a primary cause of the homelessness dilemma. *Id.* at 26.

206. Bell, *supra* note 115, at 64.

enforce a "management side of due process"²⁰⁷ through constant litigation, careful drafting of tailored consent decrees, and laborious monitoring of those decrees. The legal theories in most of the cases are simple, because the causes of action usually involve the failure of a state agency to meet the clear regulatory criteria for case processing that I have already examined.²⁰⁸ As I will discuss, it is primarily through litigation over timely case processing that plaintiffs reach the deeper issues of systemic discouragement.

What is not simple is the relief that the parties craft, usually incorporated into consent decrees.²⁰⁹ The breadth and detail of the remedies reveal the extent of deficiencies not only in office management, but in the intraoffice communication of any kind of defensible procedural norms. Remedies in what I call "discouragement litigation" fall into two broad categories: those that address lapses, accidental or deliberate, in affording potential applicants and applicants access to correct and timely process; and those that address lapses, accidental or deliberate, of the agency to enforce the norms of correct and timely process throughout the bureaucratic culture.

Many of the remedies designed to ensure access are directed at informing current and potential applicants of their rights. One decision dictated the installation of a "Timely Food Stamp Issuance Hotline," with rollover numbers, to enable applicants to receive immediate information about the program and about the status of their own applications.²¹⁰ Other cases have required the development of plans for the distribution of notices to applicants and potential applicants containing detailed information about the agencies and their obligations and deadlines.²¹¹ Some orders even include explicit instructions on where in the waiting rooms informational fliers and posters are to be displayed, and mandate the size of and language on the posters.²¹² This

207. See Mashaw, *supra* note 160.

208. See, e.g., *Robertson v. Jackson*, 766 F. Supp. 470, 473-74 (E.D. Va. 1991) (finding that all food stamp processing deadlines are "regularly missed and grossly ignored," and noting "shameful widespread and serious violations in processing expedited applications"); *Alexander v. Hill*, 549 F. Supp. 1355, 1356-57 (W.D.N.C. 1982) (noting, in summarizing previous eight years of the litigation, recurrence of same basic failure of defendants to abide by regulatory deadlines for processing AFDC and medical assistance claims).

209. An exception was the order in *Robertson*, in which the judge was so outraged by the violations of the law that he not only detailed the outlines of the relief himself, but also gave the defendant only five days to submit a draft for the court's approval of the detailed notice to applicants about their rights to benefits, and only five days after approval to disseminate the notice to all local agency offices. *Robertson*, 766 F. Supp. at 477.

210. *Id.*

211. See, e.g., Consent Decree at 5-7, *Fauntleroy v. Staszak*, No. 90-CV-424 (N.D.N.Y. Feb. 15, 1992) (describing contents of packet of information to be distributed to applicants); Consent Order Exhibit A, *Alexander v. Flaherty*, No. C-C-74-183-M (W.D.N.C. Mar. 20, 1992) (attaching, to consent order, sample of "Notice of Inquiry," to be issued when person decides not to apply). In *Flaherty*, the notice contained a space for the worker to record why the applicant decided not to file, and a notice on the back describing types of "discouragement" and stating the applicant's right to file for a hearing if she has been "discouraged." *Id.* Exhibit C.

212. Consent Decree at 6-7, *Fauntleroy*, No. 90-CV-424 (N.D.N.Y. Feb. 15, 1992); Stipulation and Order of Settlement at 3-4, *Robinson v. Grinker*, Index No. 40610/87 (N.Y. Sup. Ct. Sept. 29, 1993)

emphasis reflects the recognition that the insular attitudes responsible for sequestering clients from information and assistance are also responsible for the poor quality of managerial performance.

In *Lewis v. Johnston*, in which verification extremism was alleged as a primary cause of action,²¹³ the consent decree obligated the managers of the state welfare offices to implement a policy of accepting the applicant's word as the chief source of verification, and to require at most one corroborating source.²¹⁴ Line workers were obliged to construe the validity of that source liberally.²¹⁵ All applicants were to receive a list of the range of acceptable documents at their interviews.

Other remedies address the "neutral" operations that allow welfare offices to exclude poor people from the application process. Some measures include the institution of applicant sign-in logs to confirm the applicant's appearance at the welfare office and provide a check on whether she was allowed to file an application immediately.²¹⁶ Some relief strikes at the root causes of discouragement. For instance, by tolling the ninety-day statute of limitations within which unsuccessful applicants normally may file a request for a fair hearing, the most recent consent order in the twenty-year *Alexander* litigation over delays in processing AFDC and Medical Assistance applications addresses how disentanglement reduces poor persons' expectation of fair treatment, and thus their ability to "claim" under the statute. Under the regulations, the ninety-day period runs from the date of "agency action";²¹⁷ since agency action may masquerade as apparent inaction, frustrated claimants need extra time to compensate for the period during which they could not have known that they were being discouraged. The consent order requires that notices to applicants contain information about what "discouragement" means, so that applicants can recognize it when it is happening to them. For instance, notices to applicants must inform them that "discouragement" includes improper inducements to withdraw their applications.²¹⁸

(requiring placement in benefits offices of 11" x 17" posters informing applicants of right to apply even if they cannot produce complete documentation of eligibility, and of right under prior order to have any applications renewed if they were erroneously denied for lack of documentation).

213. Complaint at 9, *Lewis v. Johnston*, No. CA3-87-1764-R (N.D. Tex. filed July 17, 1987). For example, plaintiff alleged she was denied assistance for the nieces of whom she had custody because plaintiff could not provide her mother's or husband's birth certificates, even though the department of human services had already checked the mother's birth certificate in connection with a prior welfare application and the children's original caseworker had confirmed their family status by phone call. *Id.*

214. Consent Decree at 4, *Lewis*, No. CA3-87-1764-R (N.D. Tex. Feb. 21, 1989).

215. *Id.* at 5; see also Consent Order at 12, *Flaherty*, No. C-C-74-183-M (W.D.N.C. Mar. 20, 1992) (stating that workers must accept applicant's written statement as verification where no other sources available).

216. See *Alexander v. Hill*, 625 F. Supp. 564, 566 (W.D.N.C. 1985); Consent Decree at 10, *Fauntleroy*, No. 90-CV-424 (N.D.N.Y. Feb. 15, 1992) (instructing local offices to keep logs of applicants and of all inquiries about program).

217. 45 C.F.R. § 205.10(a)(5)(iii) (1993) (requiring states to allow "reasonable time, not to exceed 90 days").

218. Consent Order at 16, *Flaherty*, No. C-C-74-183-M (W.D.N.C. Mar. 20, 1992).

The culture into which reforming litigators intrude—and into which they can gain entry thanks only to the courage of clients—extends beyond the immediate confines of the waiting room. It is critical for those intending to improve the management of welfare offices through litigation to understand the depth of the culture of resistance to external norms. For example, the legislative and executive branches of the District of Columbia's government have long demonstrated ambivalence in fulfilling virtually all of the District's statutory obligations to the poor. This ambivalence has manifested itself in a history of failure to implement fully the statutes that constructed a comprehensive overnight shelter system;²¹⁹ and, more generally, to distribute all public assistance benefits as required by law.²²⁰ The patterns of reluctant commitment, recalcitrance, and then retrenchment are too repetitious to be explained away as occasional slip-ups; they suggest at least a habit, if not a policy, of resistance.²²¹ The occasions of disentanglement that we have

219. See Memorandum Opinion and Order at 11, 16–21, *Fountain v. Barry*, No. 90-1503 (D.C. Super. Ct. Oct. 12, 1990). The court cites examples of homeless families remaining in hotel shelters from six months to four years, *id.* at 16–17, of families being bused, after long waits, to the Pitts Hotel for meals because of a lack of cooking facilities in rooms, and sometimes being barred from returning to hotel rooms until nightfall, *id.* at 11, and of how sharing beds and living with several other family members in one room contributed to the spread of chicken pox, ear infections, colds, and influenza, *id.* at 18. In the Supplemental and Expanded Findings of Fact, *Atchison v. Barry*, Case No. CA-11976'88 (D.C. Super. Ct. Jan. 12, 1989), the court noted that the danger from assaults, rat bites, tuberculosis, and other diseases was as severe in two of the men's shelters as on the street, *id.* at 1–2, and that overcrowding by as much as a third of capacity exists at all three men's shelters, with men sleeping on windowsills and in bathrooms, *id.* at 2–3. The court described these shelters as "hell-holes":

For example, the toilet facilities at Blair and Pierce usually do not function and are infrequently cleaned: urinals and toilets are stuffed up and overflowing, so that men sleeping on hall floors often wake up to find themselves lying in urine; those toilets which do work are often covered with feces for days at a time; the stench throughout the facilities is overpowering.

Id. at 5. In light of the repeal of the Right to Overnight Shelter Act, however, the court dismissed *Atchison*. See Order of Dismissal, *Atchison*, Case No. CA 11976'88 (D.C. Super. Ct. June 27, 1991). For a fuller description of the *Atchison* and *Fountain* litigations in the context of the history of the passage and repeal of the Right to Overnight Shelter Act, see Lois G. Williams et al., *The District of Columbia's Response to Homelessness: Depending on the Kindness of Strangers*, 2 D.C. L. REV. 47 (1993).

220. See Contempt Orders, *Motley v. Yeldell*, No. 74-13 (D.D.C. Feb. 18, 1977; Feb. 8, 1978; and July 24, 1985) (holding District in contempt for failure to accord applicants for AFDC rights to file applications promptly, in violation of Court's original order of Nov. 8, 1974); Contempt Orders, *Feeling v. Barry*, No. 82-2994 (D.D.C. Jan. 28, 1988, and D.D.C. Mar. 2, 1993) (holding District in contempt for failure to process emergency assistance applications within eight working days, in violation of consent judgment of Mar. 2, 1993). As the court noted in its latest order:

Plaintiffs have clearly demonstrated to this Court that today, nearly seven years later, the District of Columbia continues to be in violation of the eight day processing rule they agreed to in paragraph 2 of the Consent Judgment in approximately fifteen to thirty percent of the emergency assistance program applications filed each month

Contempt Order at 1, *Feeling*, No. 82-2994 (D.D.C. Mar. 2, 1993); see also Consent Order at 2–3, *Jones v. Barry*, No. 82-419 (D.D.C. June 25, 1982) (finding delays in processing applications and failures to screen for potential eligibility in District's general public assistance program).

221. For example, see WASHINGTON LEGAL CLINIC FOR THE HOMELESS, COLD, HARSH AND UNENDING RESISTANCE: THE DISTRICT OF COLUMBIA GOVERNMENT'S HIDDEN WAR AGAINST ITS POOR AND ITS HOMELESS (I. Michael Greenberger et al. eds., 1993), where 18 plaintiffs' attorneys describe 24 actions brought within the last decade against the District alleging violations of District or federal statutes or regulations concerning the administration of human services programs and prisons.

examined all represent the human consequences of these mixed signals from above, as translated into welfare administration on the ground floor.

Thus the most critical relief that parties or a court can fashion is that which appreciates the necessity not only of substituting humane and legal practices for harassing ones, but of communicating the desirability of doing so throughout the agency's culture. The most important elements of the *Johnston* decree may have been those that set deadlines and stipulated mechanisms for informing front-line staff about the new verification procedures. These mechanisms included modification of the Income Assistance Handbook to conform to the new policy, circulation of the decree, individual conferences with workers, and formalized training.²²² Litigants in *Robinson* also agreed to include in their settlement a stipulation for periodic retraining of front-line staff in proper verification procedures.²²³ Plaintiffs' attorneys in the *Alexander* litigation even suggested that staff might find reinforcement in the "right" way of doing things by broadcasting a motivational song over the office's public address system.²²⁴

These decrees represent extraordinary products of collaboration—collaboration under duress, but collaboration all the same—between advocates for welfare applicants and recipients, and the welfare bureaucracy. In that respect, they "fill in" (if unstably and unpredictably) for the kind of uncoerced dialogue that should form the basis for welfare administration, but which does not. There are other significant problems with entrusting the job of managing complicated welfare bureaucracies to litigation. One, most obviously, is the drain on the plaintiffs' and their representatives' time and resources. Some of these lawsuits have lasted for almost a generation, draining litigants and litigators of energy, if not of resolve.²²⁵ The bureaucratic cultures that the District of Columbia exemplifies provide constant resistance to court-ordered

222. *Id.*

223. Stipulation and Order of Settlement at 3, *Robinson v. Grinker*, Index No. 40610/87 (N.Y. Sup. Ct. Sept. 29, 1993).

224. Plaintiffs' attorneys urged the court to order the playing of the inspirational "The Ballad of Davie County" over the public address systems of that county's social services office, in recognition of its status as the only county to comply fully with court orders for timely processing of applications for assistance. The court declined, but did publish the song. See *Alexander v. Hill*, 625 F. Supp. 564, 567 (W.D.N.C. 1985) ("We take applications without a pause; We're never overdue without good cause; Nobody else obeys these laws; Give us a break, Old Santa Claus! Davie, Davie County, King of the Processors!") (sung to the tune of "The Ballad of Davey Crockett").

225. See, for example, *Newsom v. Grunow*, No. 3:73-7136 (M.D. Tenn. Oct. 16, 1992), in which the most recent order of October 16, 1992, ensued from a petition for contempt based on an order issued on September 21, 1973. Likewise, in *Alexander v. Flaherty*, No. C-C-74-183-M (W.D.N.C. Mar. 20, 1992), the first complaint, under the name of *Alexander v. Hill*, was filed on August 28, 1974. Since then at least 12 orders have been issued, of which six were reported cases. See *Alexander v. Hill*, 625 F. Supp. 564; *Alexander v. Hill*, 553 F. Supp. 1263 (W.D.N.C. 1982); *Alexander v. Hill*, 553 F. Supp. 1261 (W.D.N.C. 1982), *aff'd*, 707 F.2d 780 (4th Cir.), *cert. denied*, 464 U.S. 874 (1983); *Alexander v. Hill*, 549 F. Supp. 1355 (W.D.N.C. 1982). A litigator involved in suing New York City for processing delays incurred through verification extremism compared the never-ending motions and monitoring to the United States' experience of being bogged down in Vietnam. See Interview with Stephen Loffredo, counsel to plaintiffs in *Robinson v. Grinker*, Index No. 40610/87 (N.Y. App. Div. Sept. 9, 1993) (Nov. 15, 1994).

change, as to any other kind, and plaintiffs must maintain constant vigilance against backsliding into prohibited practices.

Another issue involves the way that, of necessity, all of these lawsuits begin: with one glimpse of one problem in the application process, the investigation of which yields information about a cascade of other problems.²²⁶ The discovery of bureaucratic excesses is haphazard at best. It depends on the energy of an applicant who expects to be able to file an application, and will be disappointed if she cannot; or, if she does file, who expects and fails to receive an expeditious decision. Then she must realize that something is amiss; and either take action herself, or complain to some other third party in a position to fashion her grievance into something actionable. Thanks to discouragement, these actions and reactions are highly unlikely. It is usually at the point where the most is going wrong that the persons most in need of services will be least likely to realize it. Thus, attempts to manage due process from the outside cannot offer considered, systematic solutions. They succeed only at the cost of repeated rebuffs and failures in individual cases, in which the attention drawn by the advocates' visibility to the needs of the applicants often can be as detrimental as beneficial.

The question might be, then, not "who's minding the store?" but, "is there a better way?" Joel Handler has discussed whether there can ever be a "dialogic community" in which recipients and dispensers of services can review their interactions as part of a mutual enterprise, without fear of intimidation or recrimination.²²⁷ There are instances when advocates reach out, not solely in response to litigation, to suggest how adherence to legal norms might also serve interests of good management.²²⁸ But long-time observers of bureaucracies voice pessimism about whether the usual standards for promoting a policy of bureaucratic accountability can be effective in policing the activities of front-line workers, with the amorphousness of the workers' and the systems' goals and the impenetrability of workers' sequestered activities to supervisory control.²²⁹ If there is any hope for

226. Where there's smoke, there's more smoke; delays in processing are usually the more visible accompaniments to gate closing and other disentanglement practices, so that what start out as "delay cases" end up uncovering and challenging the full range of disentanglement practices. For example, the many iterations of the disentanglement case of *Alexander v. Hill*, filed on August 28, 1974, and continuing through its most recent consent decree of March 20, 1992, began with challenges to the states' delays in processing AFDC and Medicaid applications. In the course of the litigation the plaintiffs' attorneys brought to the court's attention severe staff shortages, of which the defendants were aware and yet failed to remedy. *Alexander*, 549 F. Supp. at 1358.

227. Joel F. Handler, *Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community*, 35 UCLA L. REV. 999, 1093 (1988).

228. See, e.g., EVERGREEN LEGAL SERVS., LEGAL SERVICES BRIEFING BOOK TO DEPARTMENT OF SOCIAL AND HEALTH SERVICES at i-ii, 10-12 (1993) (suggesting cost-neutral ways in which the Department could address culture of verification extremism that produced illegal and inefficient practices).

229. See MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY 161 (1980) (describing how standard preconditions for accountability, such as clearly defined programmatic goals and clearly measurable indicia of performance, do not apply to the situations of street-level bureaucrats); *id.* at 169 (describing how the sequestration of most front-line bureaucratic processes, such as intake interviewing, makes supervisory

administrative, nonlitigative solutions, it appears to lie with the commitment of persons in positions of executive authority to set and communicate clear, law-bound priorities for swift and evenhanded service.

B. *Enhanced "Dignitary Due Process"—Recognizing a Right To Plan*

For good or ill, the current procedural law of public benefits may say as much as it can, or needs to, to ensure fairness to the welfare recipient or applicant. The language of the regulations governing AFDC already fits the full meaning of the statute's injunction to assist "all individuals *wishing* to make application."²³⁰ The issue is not one of re-creation of norms, but again of enforcement and communication of the norms that are already clearly stated.

Some regulatory adjustments would clearly inure to the clients' benefit. An emphatic return to the declaration method of establishing eligibility, at least in routine matters of proving identification, would decrease the ripple effects of verification extremism and enhance clients' security. A recent statutory relaxation of verification requirements for applicants for veterans' benefits (admittedly, a group incurring far less public distrust) shows that this can in fact be done.²³¹

But norms that exist now may well not exist forever. Technically, "disentitlement" can occur only in the presence of "entitlement": poor people can enforce a statutory right to apply against bureaucracies only because benefits programs are open-ended. In fact, as we have seen, the formal status of a benefit as an entitlement means little on the waiting room floor.²³² Yet the impending transformation of AFDC and food stamps, hitherto treated as open-ended entitlements, into capped programs will create a world in which

oversight and evaluation virtually impossible).

230. 42 U.S.C. § 602(a)(10)(A) (1988) (emphasis added); see 45 C.F.R. § 206.10(a)(1) (1994) ("Each individual *wishing* to do so shall have the opportunity to apply for assistance under the plan without delay." (emphasis added)).

231. Veterans' Benefits Improvement Act of 1994, Pub. L. No. 103-446, § 302, 1994 U.S.C.C.A.N. (108 Stat.) 4645, 4657 (allowing a veteran's statement to suffice for proof of marital relationship, death of a family member, or birth of a child).

232. In fact, as shown when the District of Columbia's overnight shelter program changed from being an open-ended entitlement to a closed system based on availability, discouragement practices occur regardless of whether applicants have a right to shelter. As a corollary, state-administered federally subsidized housing programs, which close off applications and offer no entitlement, do afford due process hearings to dissatisfied applicants. See, e.g., 24 C.F.R. §§ 966.50-.57 (1994) (mandating a grievance procedure for public housing applicants and tenants); 59 Fed. Reg. 36,685 (1994) (to be codified at 24 C.F.R. § 986.202(c)) (stating that while applicants for the § 8 certificate or voucher programs have no "right or entitlement to be listed on the HA waiting list" applicants retain independent rights to challenge constitutional or statutory violations). The Housing Authority is also required to maintain waiting lists according to published norms. See *id.* (stating that Housing Authority must select "participants" from a waiting list, and that selection must conform to "admission policies in the [Housing Authority] administrative plan and [equal opportunity] plan"); see also D.C. Mun. Regs. tit. 14, § 6301.1 (1991) (affording access to administrative grievance procedure for public housing applicants and tenants).

substantive eligibility will provide no guarantee of access.²³³ In this world, even the limited paper standards afforded by the old system's statutory and regulatory protection of applicants will disappear.

To provide for the security of the most desperate in a world with no protections, any recipient-centered jurisprudence must take cognizance of the injuries inflicted upon those who await acknowledgment in dreary office buildings and have no place else to go. Applicants for benefits already inhabit a destabilized world; they enter one made still more destabilizing by the perpetuation of uncertainty and the dissemination of misinformation. Personalized slights and impersonal inaction deprive applicants of the only property they have left: the ability to plan. If one sees due process as a vehicle for the preservation of personal dignity and the opportunity for self-determination,²³⁴ then agency action that compromises this ability to plan should be all the "due process trigger" that anybody needs.²³⁵

The homeless families waiting at OESSS defined "brutal need," in a way perhaps impossible to conceptualize in the late 1960's, when homelessness—wholly undefined by possession of property, or perhaps defined by the lack of it—was a barely noticeable phenomenon. Yet when the *Goldberg* Court decided the case presented to it, one that focused on "rights" as securing possession rather than access,²³⁶ this limitation of vision did not remove the application process from judicial scrutiny. "Due process" must, and does, see more than denials. The injuries inflicted on applicants are repeated and intense: the loss of an application, the disregard of waiting lists, the dispensing of conflicting information, and the hours of waiting without any information at all. Even if these indignities against poor people do not constitute bright-line constitutional "denials," under circumstances of extreme pressure for survival, where certainty is everything, they cause as much pain.²³⁷ The state of being an applicant arguably creates the greatest

233. As of this writing, welfare legislation to change the historic entitlement status of AFDC is being proposed and revised at a dizzying pace. Nonetheless, one linchpin of the many "reform" bills that is likely to remain constant is the provision of the Personal Responsibility Act of 1995 that explicitly ends the entitlement status of AFDC and a number of other programs. See H.R. 4, 104th Cong., 1st Sess. § 302 (1995).

234. See, e.g., Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 965 (1982) (extrapolating from the Lockean concept of property in person, which generates an entitlement to the conservation of whatever personhood needs enable one to survive); *id.* at 989 (suggesting theory of welfare rights based on satisfaction of "personhood needs").

235. See, e.g., Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1329 (1987) (noting that the original value placed on security in property arose from the perception that it guaranteed independent, competent participation in the polity).

236. See Sylvia A. Law, *Some Reflections on Goldberg v. Kelly at Twenty Years*, 56 BROOK. L. REV. 805, 809-10 (1990) (noting that *Goldberg*'s plaintiffs pressed for recognition of property right in continued receipt of welfare benefits, rather than claiming that any harmful government action requires due process protection).

237. See Lucie E. White, *Goldberg v. Kelly on the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861, 867-8 (1990) (noting that *Goldberg*'s limited scope risks condoning "subtle insults that do not easily translate into constitutional claims").

dependency, the greatest inequality of bargaining power, and therefore the greatest need and call for due process protections.

V. CONCLUSION

Twenty years ago, Piven and Cloward summarized descriptions of practices inside the interview cubicles and in the waiting rooms of welfare offices of several cities. The narratives included accounts of long-delayed appointments for demeaning interviews, multipaged lists of verification requirements and supporting documents, several month-long backlogs in the processing of applications and the issuing of checks, and descriptions of weary, overworked staff.²³⁸

The current forms of disenfranchisement fit into a pattern. The same phenomena have been recurring for decades. Most disheartening is that all the forces that have been mustered to disrupt the pattern seem, in some respects, also to repeat; worse, to have to be reinvented each time by different individuals—fair hearing by fair hearing, decree by decree.

While some commentators glean hope from increased process and more lawyers,²³⁹ these remedies only work in the comparatively open world of propertied persons. In that world, access to process is a better possibility. However, that world differs in fora, spaces, urgencies, and expectations, from the world of the totally disenfranchised where process is debased and access to lawyers a nonissue. Thus, lawyers as movers of process may not be the answer. Rather, the presence of observers may be that to which we should aspire. To know about the hidden world of waiting rooms is inevitably to be outraged by the debasement of process and personalities that occurs there. Observers serve as witnesses to these abuses; their resulting testimony appeals to the heart. Simply breaking up the isolation of “the house” may give homeless people a glimpse of the kindness of strangers and the advocacy of friends.

238. FRANCIS FOX PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR* 152–74 (1971).

239. See, e.g., Ken Karas, *Recognizing a Right to Counsel for Indigent Tenants in Eviction Proceedings in New York*, 24 COLUM. J.L. & SOC. PROBS. 527 (1991); Andrew Scherer, *Gideon's Shelter: The Need To Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.-C.L. L. REV. 557 (1988).